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Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusions

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Articles

Claims for Protection Based on Religion or Belief

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Abstract

Persecution for reasons of religion is one of the five grounds enumerated in the 1951 Convention relating to the Status of Refugees. The *travaux préparatoires* do not include any discussion of religion as a Convention ground for protection. The *Handbook on Procedures and Criteria for Determining Refugee Status* contains three paragraphs (71–73) addressing religious persecution, which demonstrate the intent that the Convention ground be interpreted by reference to international norms on freedom of thought, conscience and religion. To date there has been very little interpretive guidance on religion-based claims. The approach to determining the key elements in a refugee adjudication — what is a religion, what constitutes persecution in the context of religious practice, when is the persecution 'for reasons of' the individual's religious beliefs — are less clear today than they were when the 1951 Refugee Convention was drafted. This article surveys the jurisprudence of religion-based claims of four State parties to the Convention (the United States, Canada, New Zealand and the United Kingdom), identifies relevant issues and trends, and proposes an analytical framework for religion-based claims which is derived from international norms of protection for religion and belief.

1. Introduction

The recognition of freedom of religion or belief as a fundamental human right is well-established in numerous international[1] and regional

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[1] See, for example, Universal Declaration of Human Rights, UNGA res. 217A(III), 10 Dec. 1948, Art. 18 [hereinafter 'Universal Declaration' or 'UDHR']; International Covenant on Civil and Political Rights, UNGA res. 2200A(XXI), 23 Mar. 1976, Art. 18 [hereinafter 'ICCPR' or 'CCPR']; Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, UNGA res. 36/55, 25 Nov. 1981, Art. 1 [hereinafter 'Declaration'].

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instruments.[2] Religion or belief has also 'long been the basis upon which governments and peoples have singled others out for persecution'.[3] The twentieth century bore witness to the Nazi genocide against Jews, in which millions perished and those seeking protection were often turned back.[4] It was this great tragedy, and the failure of the international community to protect World War II refugees that gave rise to the contemporary refugee protection regime. The Jewish victims of the Holocaust were clearly contemplated by the drafters of the Refugee Convention when they included religion as one of the five grounds for protection in the Convention. Religious persecution, and the importance of protection from it, has not become an anachronism in the half-century following World War II. To the contrary, although the contours and context of religious persecution have changed since World War II, its persistence as a contemporary reality has not.

Following the Holocaust, and under the rule of the former Soviet Union and Eastern bloc countries, religious persecution often took the form of '[s]tate policies against religion and policies designed to control religious

[2] See, for example, Art. 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (entered into force 3 Sept. 1953) [hereinafter ECHR]; Art. 12 of the American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978); Art. 8 of the African Charter on Human and Peoples' Rights, adopted 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5, 21 I.L.M. 58 (1982) (entered into force 21 Oct. 1986); Principle VII of the Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accords) (adopted 1 Aug. 1975); Concluding Document of the Vienna Meeting 1986–89, Questions Relating to Security in Europe, Principle 16.

[3] In 1986, Elizabeth Odio Benito, the U.N. Special Rapporteur on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief, observed that religious persecution has been with humankind for many years, and continues to the present:

> History is full of stories resulting at least partly from religious intolerance between nations: the Crusades (against Jews, Orthodox Christians and Muslims) from the eleventh to the fifteenth centuries; the sixteenth century wars of religion, the Thirty Years War, in the seventeenth century, the wars between Islam and Christendom from the eighth to the nineteenth centuries, etc. Unfortunately, we are not yet free from such international human destruction resulting from religious intolerance.

Elizabeth Odio Benito, 'Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief, Study of the current dimensions of the problems of intolerance and of discrimination on grounds of religion or belief': UN doc. E/CN.4/Sub.2/1987/26, 31 Aug. 1986, para. 157.

The refugee scholar Guy S. Goodwin-Gill has made a similar observation regarding the prevalence of religious persecution through the ages; referring to the massacre and oppression of the Huguenots in the seventeenth century following revocation of the Edict of Nantes, the pogroms of Jews in Russia and Armenian Christians in Ottoman Turkey in the nineteenth century, and the genocide against Jews under the Nazi and Axis powers in the twentieth century. Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 2d edn., 1996), 44.

[4] One of the best known incidents of the United States' refusal of protection was the turning back of the vessel St. Louis. Former U.S. Assistant Secretary for Democracy, Human Rights and Labor, Harold Hongju Koh has referred to the 'ill fated voyage of the St. Louis in 1939' as the 'Voyage of the Damned ... when the United States rebuffed fleeing Jewish refugees who had arrived in New York and Miami harbors, forcing many back to die in Nazi gas chambers'. Harold Hongju Koh, 'Reflections on Refoulement', 35 *Harv. Int'l Law J.* 1 (1994), 7, citing Gordon Thomas & M. Morgan Witts, *Voyage of the Damned* (1974).

matters in the name of a political ideology . . . '.[5] With the dissolution of the Soviet Union, the existence of totalitarian anti-religious States has dramatically declined,[6] and religious persecution is now more likely to be associated with the rise of nationalism and religious fundamentalism. Successive U.N. reports have detailed how these trends have resulted in an upsurge of violations against minorities as well as women,[7] in a complex socio-political context where 'it is no easy task to make a clear distinction between religious conflicts and those of other kinds, particularly political and ethnic'.[8]

The persistence of religious persecution into the twenty-first century assures that it will continue to be a Convention ground upon which claims for protection are based. Some scholars have observed that religion will not only continue to be a significant ground, but that it is likely to gain increasing prominence as a ground of protection[9] because of the resurgence in fundamentalism and nationalism,[10] the relationship between religion or belief and the rights of women,[11] and the sustained concern with religious freedom or belief at the international[12] as well as State level.[13]

[5] 'Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief': UN Doc. A/53/279, 24 Aug. 1998, para. 85(a)(transmits interim report prepared by Special Rapporteur).

[6] 'Elimination of all forms of Religious Intolerance': UN doc. A/54/386, 23 Sept. 1999, para. 132(a) (note by the Secretary General transmitting interim report by the Special Rapporteur, identifying China, Democratic People's Republic of Korea and Viet Nam as countries where state policies against religion persist).

[7] See, for example, A/53/279, n. 5 above, para. 85(b) and (d); A/54/386, n. 6 above, para. 132(3), 133–139; 'Civil and Political Rights, including Religious Intolerance: Report submitted by Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1999/39': UN doc. E/CN.4/2000/65, 15 Feb. 2000, para. 173–175; 'Civil and Political Rights, including Religious Intolerance: Report submitted by Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 2000/33': UN doc. E/CN.4/2001/63, 13 Feb. 2001, paras. 181–188.

[8] 'Civil and Political Rights, including Religious Intolerance: Report submitted by Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1998/18': UN doc. E/CN.4/1999/58, 11 Jan. 1999, para. 115(e).

[9] James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths 1991), 145, n. 72; Deborah E. Anker, *Law of Asylum in the United States* (Boston: Refugee Law Center, 3d edn., 1999), 398–99.

[10] See Hathaway, n. 9 above, 145, n. 72; Anker, n. 9 above, 399.

[11] See Anker, n. 9 above, 399.

[12] Since 1987 the Special Rapporteur of the Commission on Human Rights has examined State compliance with the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief, and has submitted annual reports to the Commission. Beginning in 1994, the Special Rapporteur's reports have also been submitted to the General Assembly. E/CN.4/2001/63, n. 7 above, para. 1.

[13] In the United States concern regarding freedom of religion and belief is demonstrated by enactment of the International Religious Freedom Act of 1998, 22 U.S.C.A. §§ 6401 and following. The Act requires, *inter alia*, the preparation and submission of annual reports to Congress on international religious freedom, 22 U.S.C.A. § 6412(b), and includes within its mandate issues related to the protection of individuals fleeing religious persecution, 22 U.S.C.A. §§ 6471–4.

At the same time as there is recognition of the growing importance of religion-based claims, there is also recognition of the analytical complexity posed by these claims. The clear-cut, familiar model of a totalitarian State forbidding all religious practice has all but given way to a myriad of situations involving States that do not prohibit practice, but may instead have an official religion, or simply favor one religion over another and discriminate against those who are not adherents of the favored religion. Non-state, as well as State, actors may commit acts of persecution. The persecution may be inter-religious (directed against religious adherents or communities of different faiths or no faith at all), intra-religious (within the same religion, but between different sects) or both inter-religious and intra-religious.[14]

Not only are the contexts in which persecution takes place more varied than under the 'classic' anti-religion totalitarian model, but the nature of religious belief or practice raises new questions. Christianity, Islam, Judaism, Buddhism and Hinduism are all clearly recognized as religions; they are referred to as the 'major religions' of the world.[15] However, depending on who is doing the categorizing, other communities of belief may not readily be recognized as religions or beliefs coming within the parameters of the international norm of protection.[16] The ongoing controversy over Scientology is illustrative of the range of perspectives on classifying a belief community as a religion or not.[17]

In addition, it has become increasingly clear that the motivations for 'religious persecution' are more complicated than might initially appear. Factors related to religion are often inextricably intertwined with 'non-religion' factors. As the U.N. Special Rapporteur on Religious Intolerance observed in his 13 April 2000 report, 'deviation in creed alone does not

[14] See, for example, A/54/386, n. 7 above, para. 129.

[15] 'Elimination of all forms of Religious Intolerance: note by the Secretary-General': UN doc. A/56/253, 31 Jul. 2001, para. 100 (transmitting interim report of Special Rapporteur on Religious Intolerance).

[16] In a recent report, the Special Rapporteur highlighted the controversies that can exist over the definition of various communities of belief:

> [S]ome communities can be classified, depending on who is doing the classifying ... as either a variant of a major religion or as a separate religion, or even as a belief or organization with goals unrelated to any religion or belief. For instance, the Ahmadi claim to be Muslims and are recognized as such in some countries, including Bangladesh, but are denied such recognition in Pakistan. Similarly, the Jehovah's Witnesses claim to be part of the Christian community and are recognized as being part of it in several States but are termed a sect by other States. Scientology is the most polemical example insofar as it calls itself a religion, is viewed as such for tax purposes in the United States, but is called a sect or even a criminal organization in certain other States, especially in Europe.
>
> Ibid., para. 102

In another report, the U.N. Special Rapporteur has pointed out that religious minorities are often referred to pejoratively as 'sects' in order to avoid calling them 'religions'. 'Elimination of all forms of Religious Intolerance: note by the Secretary-General': UN doc. A/55/280, 8 Sept. 2000, para. 92 (transmitting interim report of special Rapporteur on Religious Intolerance).

[17] See Arthur Helton & Jochen Munker, 'Religion and Persecution: Should the United States Provide Refuge to German Scientologists?', 11 *IJRL* 310 (1999).

account for [religious] persecution'.[18] Religious discrimination and persecution arise from a complex set of factors having to do with 'questions of politics and power, relations between States, social and cultural factors, economics and even ancient history'.[19] These observations draw on, and echo, an earlier U.N. report by Special Rapporteur Elizabeth Odio Benito:

> A final point that should be borne in mind when seeking out the causes of intolerance and discrimination based on religion or belief is that these causes are often interrelated. The underlying causes of any form of discrimination are complex, multifaceted and intertwined. Gordon Allport, the late, leading social psychologist, offers several general reasons for religious discrimination in his book on the nature of prejudice. One cause suggests that piety is a 'mask' for prejudices which intrinsically have nothing to do with religion. Instead it is historical, sociocultural or physical factors that have provoked the dislike and hostility. Hence religion is not the cornerstone of the discrimination. Rather, the conceptions of the teachings of a religion have been twisted and construed to condone the prejudice.[20]

It is in the context of the growing importance of religion-based claims, and with the recognition of the complicated historical and socio-political factors within which the claims arise that this paper is undertaken. The right to freedom of religion or belief, and the value placed upon protecting individuals from religious persecution is beyond cavil. But the analytical framework necessary to respond to the claims raised in the twenty-first century is less clear. To date, there has been very little interpretive guidance on religion-based claims. The approach to determining the key elements in a refugee adjudication — what is a religion, what constitutes persecution in the context of religious practice, when is the persecution 'for reasons of' the individual's religious beliefs — are less clear today than they were when the 1951 Refugee Convention was drafted. This paper is intended to address the need for a contemporary review of religion-based claims, and the concomitant need for the development of a framework for refugee adjudicators.

This paper begins with a discussion of the religion-based persecution ground in the 1951 Refugee Convention (Part 2.1) and freedom of religion or belief in international law (Part 2.2). The core of the paper is Part 3, which provides a survey and analysis of State jurisprudence (of the common law countries of the United States, Canada, New Zealand and the United Kingdom) on elements of the refugee definition relevant to religion-based claims. Each section concludes with recommendations for an

[18] 'Racial Discrimination and Religious Discrimination: Identification and Measures', UN doc. A/CONF.189/PC.1/7, 13 Apr. 2000, para. 123 (transmitted by Secretary-General).
[19] Ibid.
[20] E/CN.4/Sub.2/1987/26, n. 3 above, para. 163.

analytical approach which is derived from and consistent with relevant international norms.

2. International standards

2.1 The Convention, the *Travaux Préparatoires*, and the UNHCR *Handbook*

Persecution for reasons of religion is one of the five grounds enumerated in the 1951 Convention relating to the Status of Refugees. The *travaux préparatoires* do not include any discussion of religion as a Convention ground for protection.[21] The *Handbook on Procedures and Criteria for Determining Refugee Status*[22] contains three paragraphs addressing religious persecution, which demonstrate the intent that the Convention ground be interpreted by reference to international norms on freedom of thought, conscience and religion. The relevant *Handbook* paragraphs are 71–73:

> 71. The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.
> 72. Persecution for 'reasons of religion' may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.
> 73. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground.[23]

Beyond the *Handbook*, there are no further explications of this ground in the form of Executive Committee Conclusions or Guidelines. On several occasions, the UNHCR has expressed its position in the form of briefs of *amicus curaie*, specifically on the issue of conscientious objection as a basis for asylum (discussed in Part 3.4.3.1)[24]. Given the dearth of authority

[21] The only discussion of religion appears to be related to the inclusion of Art. 4 of the Convention regarding the guarantee of freedom of religion to refugees in Contracting States. Nehemiah Robinson, *Convention Relating to the Status of Refugees — Its History, Contents and Interpretation: A Commentary* (New York: Institute of Jewish Affairs, 1953), 65.

[22] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*: UN doc. HCR/IP/4/Eng/REV.1, Reedited, Geneva, Jan. 1992 (1979) [hereinafter '*Handbook*' or 'UNHCR *Handbook*'].

[23] Ibid., para. 71–73.

[24] The briefs referred to are the *amicus curiae* brief submitted by UNHCR to the U.S. Court of Appeals for the Ninth Circuit in *Canas-Segovia v. I.N.S.*, 902 F.2d 717 (9th Cir. 1990), authored by Guy S. Goodwin-Gill, Susan Timberlake and Ralph Steinhardt (reproduced in full in 2 *IJRL* 390 (1990); and the *amicus curaie* brief submitted by UNHCR to U.K. Court of Appeal in *Sepet and Bulbul v. Secretary of State for Home Department (UNHCR Intervening)* [2001] EWCA Civ 681 (reproduced in part in Karen Musalo, Jennifer Moore & Richard A. Boswell, *Refugee Law and Policy: A Comparative and International Approach* (Durham: Carolina Academic Press, 2d edn., 2001) 313.

directly generated by UNHCR, and the obvious intent to interpret the Convention ground of religion in a manner consistent with international norms, an important source of guidance is that provided by the various treaties, declarations and other relevant interpretive guidance (such as General Comments of the U.N. Human Rights Committee) on freedom of religion or belief. It is to these sources of authority that the following section addresses itself.

2.2 The International Norm on Freedom of Religion or Belief

2.2.1 The Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and other Relevant International Guidance

Although the right to freedom of thought, conscience and religion had limited recognition in international law as early as the sixteenth century,[25] it was with the establishment of the United Nations that the right has its origins as an international norm. Article 18 of the Universal Declaration of Human Rights (UDHR) specifically[26] addresses the right as follows:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[27]

The principles articulated in the UDHR were incorporated into Article 18 of the International Covenant on Civil and Political Rights (ICCPR):

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

[25] Arcot Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Study of Discrimination in the Matter of Religious Rights and Practices': UN Doc. E/CN.4/Sub.2/200/Rev. 1 (1960), see generally introduction [hereinafter 'Krishnaswami Report']. See also Karen Musalo, 'Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms' (1994) 15 *Mich. J. Int'l Law* 1179 (detailing existence of unilateral and multilateral treaties for the limited protection of the rights of religious minorities).

[26] Both the Charter of the United Nations, 26 June 1945, and the UDHR Art. 2 contain more general provisions regarding religion. Art. 1 of the U.N. Charter affirms that a fundamental purpose of the United Nations is 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion', while Art. 2 of the UDHR provides that: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

[27] UDHR, n. 1 above, Art. 18.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[28]

In 1981 the U.N. General Assembly adopted by unanimous vote the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[29] Although it is not binding, the Declaration is considered to constitute an important elaboration on the right to freedom of religion or belief.[30]

2.2.2 The Scope of the Right to Freedom of Religion or Belief

Although the ICCPR itself does not define 'religion or belief' there is extensive guidance in the *travaux*, as well as from the bodies[31] relevant to the ICCPR's implementation. This discussion draws from these sources.

Article 18 of the ICCPR protects both religious and non-religious forms of belief.[32] Thus it protects the right to hold a belief as well as the 'right not to profess any religion or belief'.[33] Comprehended within this freedom is the right to choose, change or retain the religion or belief of one's choice.[34] This right to freedom of belief is absolute, and not subject to

[28] ICCPR, n. 1 above, Art. 18.

[29] Declaration, n. 1 above, item 75.

[30] Article 1 of the Declaration provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

The Declaration also addresses the right of individuals to be free from discrimination on the grounds of religion or belief (Art. 2), and the concomitant responsibility of States to take measures to prevent such discrimination (Art. 4). Ibid., Art. 1–2,4.

[31] The two main entities referred to within this section are the U.N. Human Rights Committee, created by Art. 28 of the ICCPR, which issues General Comments interpreting protected rights under the Covenant, and the Special Rapporteur on Religious Intolerance.

[32] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N.P. Engel, 1993), 316. The subject of whether the term 'belief' also protects non-religious convictions 'was the subject of extensive discussion' during the drafting of Art. 18, and it is clear from the *travaux préparatoires* that the term 'belief' was to cover non-religious beliefs such as 'agnosticism, free thought, atheism and rationalism'. Ibid.

[33] 'General Comment adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights': UN doc. CCPR/C/21/Rev.1/Add.4, 27 Sept. 1993, para. 2 (adopted 20 July 1993) [hereinafter General Comment No. 22].

[34] Ibid., para. 5.

any limitations whatsoever.[35] States are to refrain from 'coercion' or any other measures which might 'impair' this unconditional freedom.[36]

Article 18 also protects the freedom to manifest one's religion or belief in public. The freedom to manifest religion or belief 'encompasses a broad range of acts'.[37]

> The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[38]

Article 18 distinguishes between inner freedom of belief, and outer or public freedom to manifest one's beliefs. Whereas the former is absolute, the latter is subject to limitations specified in Article 18.3. Pursuant to Article 18.3, any limitation on the manifestation of religion or belief must be (1) prescribed by law, (2) serve one of listed purposes (public safety, order, health, or morals or the fundamental rights and freedoms of others) and (3) be necessary for attaining the purpose asserted.

The requirement that the limitation be prescribed by law means that it must be 'set down in a ... parliamentary act in the formal sense or an equivalent unwritten norm of common law in a manner adequately specified for the enforcement organs'.[39] The listed purposes are exhaustive rather than illustrative; limitations for any other reason are not permitted.[40] The requirement that the limitation be 'necessary' towards

[35] Ibid.

[36] 'The [U.N. Human Rights] Committee observes that the freedom to 'have or adopt' a religion or belief necessarily entails freedom to choose a religion or belief, including the right to replace one's current religion. Art. 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature'. Ibid.

[37] Ibid., para. 4.

[38] Ibid.

[39] Nowak, n. 32 above, 325.

[40] '[P]aragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security'. General Comment No. 22, n. 33 above, at para. 8.

these purposes 'implies that the restriction must be *proportional* in severity and intensity to the purpose being sought . . . '.[41] The importance attached to the right to freedom of religion or belief is underscored by the fact that it is non-derogable, even in times of public emergency.[42]

3. Interpretive Issues Related to Religion-based Claims under the Refugee Convention and State Jurisprudence

Overview

This paper is based upon the premise that the drafters of the Refugee Convention intended international norms relating to freedom of religion or belief to inform the determination of claims based on religion. It is therefore assumed, for the purposes of the analysis herein, that the definition of persecution should be interpreted with sensitivity to the parameters of the protected right, and that the other elements of the refugee definition (well-foundedness and nexus) should take into consideration the overarching objective of protection for this fundamental right. In addition, it is assumed that evidentiary standards, such as the criteria to be applied to credibility determinations, should not be applied in a manner which unfairly disadvantages claims based on religion.

In this context, the survey of State jurisprudence[43] was undertaken for the purpose of identifying interpretive issues and trends which demonstrate sensitivity to and consistency with the international norm, as well as those which do not. The identification and evaluation of the various interpretive trends provides the underpinnings for the formulation of the paper's recommendations. The recommendations are proposed to address interpretive trends which undermine protection and appear inconsistent with international norms. Wherever possible, the recommendations adopt the approach of those State tribunals which are well-reasoned and demonstrate the highest level of consistency with the international norm of protection for religion or belief.

The cases which are discussed herein are not intended to represent an exhaustive compilation of the decisional law of each of the four States. Rather they are intended to be representative of the approach to a particular issue in that State; furthermore, they were selected to provide the best example of that issue. Not every jurisdiction had published decisions relevant to the issues considered in this paper. Therefore, there are some substantive areas which only discuss the caselaw of three

[41] Nowak, n. 32 above, 325.

[42] ICCPR Art. 4.2 lists Art. 18 as one of the seven articles from which no derogation may be made. ICCPR, n. 1 above, Art. 4.2.

[43] As noted above, the discussion of State jurisprudence in this paper is limited to the United States, Canada, New Zealand and the United Kingdom.

of the four States, or two of the four States. Finally, the amount of details reported for any given case varies. For the discussion of certain substantive areas the facts of the cases are significant in order to discuss the decision;[44] in other situations, this is not the case. Thus, it should be clear that the more extensive discussion of facts in some areas, and not in others, was intentional.

3.1 Persecution

3.1.1 The Definition of Persecution in Refugee Jurisprudence

As the UNHCR *Handbook* ¶ 51 observes, '[t]here is no universally accepted definition of "persecution" . . . '. The *Handbook* goes on to state that a 'threat to life or freedom on account of [the Convention reasons] is always persecution' as are 'serious violations of human rights'.[45] However, the type of possible harms that may befall an individual are manifold and varied, and tribunals continue to struggle to reach a consistent interpretation of the term persecution.

There is consensus in refugee jurisprudence for the principle that persecution requires that the feared harm be of a serious or grave nature. However, beyond that point there is far less agreement. For example, there is ongoing controversy as to whether a harm inflicted on a single occasion can constitute persecution, or whether the term implies repetitive or ongoing harm. Goodwin-Gill[46] is a proponent of the former approach, while Hathaway[47] of the latter.

There has also been a divergence in the jurisprudence regarding persecution by non-state agents. Pursuant to the 'accountability or complicity' view, refugee protection is only appropriately extended in cases involving non-state agents where the asylum seeker's State encourages persecution, or is unwilling to offer protection (in other words is 'complicit' with the persecution).[48] In contrast, under the protection view, refugee status may

[44] In order to fully appreciate a decision regarding whether cumulative acts of harm rise to the level of persecution, it is necessary to consider what the cumulative acts were. Therefore, a review of the facts are important. In other cases, the focus might be more on issues of law (i.e., the applicable rule to establish causation) and in such cases the discussion of facts may not need to be so extensive.

[45] UNHCR, *Handbook*, n. 22 above, para. 51.

[46] Guy S. Goodwin-Gill has written: 'There being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution. Assessments must be made from case to case by taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured'. Goodwin-Gill, n. 3 above, 69.

[47] James C. Hathaway has conceptualized persecution as 'the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognized by the international community'. Hathaway, n. 9 above, 112.

[48] In the year 2000, it was reported that within the European Union, courts in France, Germany and Spain generally followed the accountability view. See Andrea Subhan, ed., 'Asylum in the EU Member States': Directorate General for Research Working Paper No. LIBE 108 EN (Brussels: European Parliament, 2000), 11–12, available at ⟨*http://www.europarl.eu.int/workingpapers/libe/pdf/108_en.pdf*⟩.

be accorded in situations where the State is not complicit, but is simply unable or ineffective in providing protection from non-state agents, as well as in situations where there is no State or effective central government.[49] UNHCR recommends the protection view, which is now becoming the clear majority position.[50]

3.1.2 State Jurisprudence Regarding Persecution

There are two broad issues of significance regarding persecution which arise in religion-based claims. The first has to do with the nature and gravity of the harm required to constitute persecution. Religion-based claims often involve discrimination against members of disfavored religious communities, limitations or restrictions on religious practice, or forced compliance with a particular religious practice. An important inquiry is when these harms rise to the level of persecution. A second important issue is the role of the State in cases involving non-state agents of persecution. The four States looked at for the purposes of this paper all accept the protection view, that is, that Convention protection may be extended to the victims of non-state agents when the State is either unable or ineffective in providing protection. However, a frequently occurring issue relates to the proper criteria for evaluating whether there has been a failure of State protection. These two sets of issues are the focus of the discussion in this section.

3.1.2.1 The Nature and Gravity of the Harm Required to Constitute Persecution Discrimination Imposed because of Religion; When does Discrimination Rise to the Level of Persecution?

In many countries, the members of a disfavored religious group are subject to discriminatory measures. These measures may be accompanied by physical harms and other threats to their physical integrity. This section examines cases where physical harm was not the central aspect of the claim, and the adjudicator was called upon to determine whether other

[49] For an extended discussion of the accountability and protection approaches, see Jennifer Moore, 'Whither the Accountability Theory: Second Class Status for Third-Party Refugees as a Threat to International Refugee Protection', 13 *IJRL* 32 (2001).

[50] In the context of evolving harmonization, the European Union recently issued a proposed Council Directive which states that the 'practice of the vast majority of Member States and other global actors' affirms that a fear may be well-founded where it 'emanates not only from the State but also from parties or organisations controlling the State or from non-state actors where the State is *unable or unwilling to provide effective protection*' [emphasis added]. Commission of the European Communities, 'Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection' (2001/0207), at Art. 9, available at (*http://www.statewatch.org/news/2001/sep/REFDIR.DOC*).

prejudicial measures — considered singularly or cumulatively — rise to the level of persecution.

An analysis of discrimination in religion-based claims should have as its point of departure the principle that pursuant to international norms any form of discrimination on the basis of religion is impermissible. CCPR General Comment No. 22[51] addresses this point, providing in relevant part that:

> The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant ... nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26.[52]

Even though discrimination for reasons of religion is prohibited, not all discrimination constitutes the basis for a claim to refugee protection. It is only when the discrimination is of a grave enough nature to rise to the level of persecution. Guidance on this issue is provided by the UNHCR Handbook in the following paragraphs:

> 54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, *e.g.*, serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.
> 55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.[53]

[51] General Comment No. 22, n. 33 above, para. 9.

[52] Art. 26 of the ICCPR provides that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ICCPR, n. 1 above, Art. 26.

[53] UNHCR, *Handbook*, n. 22 above.

Thus, in order to constitute persecution, the discrimination must 'lead to consequences of a substantially prejudicial nature' or 'give rise to a reasonable fear of persecution' and must be considered in 'light of all the circumstances'. The cumulative nature of the discriminatory actions are to be taken into consideration in making this determination.

As discussed below, a survey of the caselaw shows an uneven application of this principle, and the all too frequent reluctance to categorize pervasive and serious forms of discrimination as persecution.

United States

There are very few U.S. cases which provide a clear presentation[54] of a claim based on discrimination on account of religion.[55] Notwithstanding that fact, there are numerous cases which include language addressing the distinction between persecution and 'mere' discrimination or harassment. U.S. courts have stated that persecution 'is an extreme concept, which ordinarily does not include discrimination on the basis of race or religion, as morally reprehensible as it may be',[56] and that it does not 'include every kind of treatment our society regards as offensive'.[57] The only published decision which directly and explicitly addresses the issue of religious discrimination is *Matter of Salama*,[58] which dates from 1966 and involved an Egyptian Jew seeking protection at a time when the 'government campaign of discrimination was responsible for the departure of some 37 000 Jews from Egypt',[59] for the boycott of Jewish doctors, and for the expulsion of Jewish professionals from professional societies.[60] Under

[54] In a number of cases the details of the alleged discrimination were not clearly developed in the record. See, e.g., *Ghaly v. INS*, 58 F.3d 1425, 1428 (9th Cir. 1995) (where there is reference to 'prejudice and occasional acts of individual discrimination from Egypt's Islamic majority' but no discussion as to what form the discrimination took); *Elnager v. INS*, 930 F.2d 784, 788 (9th Cir. 1990) (where the court stated that the testimony of the Egyptian convert to Christianity 'displays little more than the fact that religious converts in Egypt may have a "hard time"' and no other details appeared to be provided).

In other cases there were allegations of discrimination, but non-discrimination factors appeared dispositive of the court's decision. See, for example, *Ambati v. INS*, 233 F.3d 1054, 1057–60 (7th Cir. 2000) (applicant from India alleged discrimination with resulting economic and physical hardships by Hindus against his father and brothers because of their Christian faith, but he did not recount discriminatory measures against himself, his wife or his children); *Yousif v. INS*, 794 F.2d 236, 243 (6th Cir. 1986) (the court upheld the BIA's denial to reopen case of Iraqi Christian who alleged discrimination/persecution where there were inconsistencies between the facts he asserted and those contained in his sister's affidavit submitted on his behalf).

[55] Cases involving gender discrimination may be analyzed as religious persecution claims. Gender claims — as well as the issue of discrimination/persecution will be addressed in Part 3.4.3.3.

[56] *Gonzalez v. INS*, 82 F.2d 903, 908 (9th Cir. 1996) [internal quotations omitted].

[57] *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993).

[58] *Matter of Salama*, 11 I & N Dec. 536 (BIA 1966).

[59] Ibid.

[60] Ibid.

those circumstances, the BIA found that the discrimination was so 'severe and pervasive'[61] to constitute persecution.

Canada

Three federal court decisions from Canada present clear fact patterns involving discrimination for reasons of religion. In all three, the tribunal below, the Convention Refugee Determination Division (CRDD), failed to find persecution and the cases were brought to the federal court for review. In only one of the three did the federal court set aside[62] the tribunal's denial. The case in which it set the decision aside was *Makhlin v. Canada (M.E.I.)*,[63] which involved a mixed couple and their daughter from the Ukraine who took up residence in Israel under that country's Law of Return. The husband was Jewish and the wife was Russian Orthodox; they left Ukraine because of anti-Semitism. After spending eight months in Israel, they arrived in Canada seeking refugee status, stating that as a result of their mixed marriage they had suffered 'discriminatory treatment and harassment, and of official indifference, perhaps hostility, towards them . . .'.[64] The CRDD had denied refugee status relying on documentary evidence regarding official freedom of religion in Israel. The federal court ruled that the CRDD had erred in relying upon this fact, rather than addressing 'persecution arising from discriminatory actions, without state protection, directed to them because of their mixed marriage, mixed because of differences under Israeli law, and practice, of the religious faiths of the parents and their perceived nationality, the husband as a Jew and the wife as a Russian'.[65]

The federal court took a different approach in a second case involving religious persecution in Israel. As in *Makhlin*, the asylum seekers in *Barkai v. M.E.I.*[66] were also a Jewish husband and his Russian Orthodox wife. In seeking asylum the couple recounted that the female applicant had experienced pervasive employment discrimination.[67] When she sought

[61] The decision in *Matter of Salama* was discussed by the Ninth Circuit Court of Appeals in *Ghaly*, 58 F.3d 1425, 1431 (9th Cir. 1995). The court characterized *Matter of Salama* as presenting the kind of 'extraordinary' circumstances in which discrimination will be found to constitute persecution. *Ghaly*, 58 F.3d 1425, 1431 (9th Cir. 1995).

[62] When the Federal Court of Canada determines that a decision is wrongly made it will 'set aside' or 'quash' it and send the case back to the tribunal for a decision consistent with the federal court's review.

[63] *Makhlin v. Canada (Minister of Employment & Immigration)* [1995] 76 F.T.R. 71.

[64] Ibid., para. 4. The male applicant also based his claim on conscientious objection to military service in Israel, stating that he did not want to serve due to the 'nature of military action against the Arab peoples[·]' Ibid., para. 5. The CRDD failed to address this element of the claim, which the federal court found to be an additional error. Ibid., para. 11.

[65] Ibid., at para. 10.

[66] *Barkai v. M.E.I.* [1994] 50 A.C.W.S. 3d 1079; also available on 1994 A.C.W.S.J. LEXIS 74622.

[67] She recounted that:

I was very eager to work in Israel and registered with a number of employment agencies and began to look for a position caring for elderly people. Initially I was often told that home care workers who spoke

employment other than home care she encountered extreme sexual harassment, which was particularly directed against Russian women; on all occasions the response to her employment searches was negative when she was identified as a non-Jew.[68] She and her husband were afraid to complain to the police because they had heard of many accounts where Russians who had complained had been beaten by police officers. In addition, they themselves had experienced a negative incident when a police officer had followed the female applicant home and propositioned her and, when her husband threatened to complain, the 'policeman replied that it would be useless ... because nobody would defend a Russian'.[69] The federal court let stand the CRDD's ruling that the 'discrimination, harassment and humiliation' to which the applicants had been subjected did not amount to persecution.[70] Notable in the case is the fact that although the CRDD acknowledged the UNHCR *Handbook*'s guidance that serious restrictions on the right to earn a livelihood can amount to persecution, in a ruling demonstrating extreme insensitivity to gender equality, the CRDD ruled that such was not the case herein because the applicant's husband could support her.[71]

The third Canadian case on religious discrimination, *Irfan Ahmed v. M.E.I.*[72] involved an Ahmadi from Pakistan. The Ahmadis, who consider themselves Muslims, constitute a disfavored religious minority in Pakistan. In 1984, Pakistan enacted Ordinance XX which added two new sections to Pakistan's Penal Code providing prison terms and fines to any Ahmadi who calls himself a Muslim, refers to his or her faith as Islam, or who preaches or propagates his or her faith by 'visible representations, or in any manner whatsoever outrages the religious feelings of Muslims'.[73]

Russian and some English were in demand. However, as soon as they inspected my [internal passport] and saw that I was not Jewish ... they lost interest in my application. I was even told frankly that some of their clients do not want to hire 'goys'. *Barkai v. M.E.I.* at para. 22.

[68] Ibid.

[69] Ibid. at para. 31.

[70] Ibid. at para. 26.

[71] *Barkai v. M.E.I.* at para. 44.

[72] *Ahmed v. Minister of Citizenship and Immigration* [1997] F.C.T.D. No. IMM-272596; also available on 1997 Fed. Ct. Trial LEXIS 913.

[73] Pakistan Penal Code § 298C, quoted in Karen Parker, 'Religious Persecution in Pakistan: The Ahmadi Case at the Supreme Court' (Los Angeles: International Educational Development, Inc., 1993), 2, available at ⟨*http://www.webcom.com/hrin/parker/ahmadi.html*⟩ (visited 5 July 2002).
Many of the religion-based cases involve Ahmadis from Pakistan. There has been widespread criticism of Ordinance XX specifically, and the treatment of Ahmadis in Pakistan generally. For example, the United Nations Sub-commission on Prevention of Discrimination and Protection of Minorities stated that Ordinance XX:

violates the right to liberty and security of the person; the right to freedom from arbitrary arrest and detention; the right to freedom of thought, expression, conscience and religion; the right of religious minorities to profess and practice their own religion and the right to an effective legal remedy.
Sub-Commission on Prevention of Discrimination and Protection of Minorities res. 1985/21, para. 1: U.N. doc. E/CN.4/1986/5 at 102, cited in Parker above, 3.

The asylum seeker in *Irfan Ahmed* sought protection in Canada, recounting that because of his religion: he was 'taunted and beaten' throughout his childhood, denied admission to local colleges, fired from his job, arrested and jailed in 1987 for having written the Kalima on an Ahmadi mosque, attacked by a Muslim mob in 1991 requiring a week of hospitalization, and in 1994 successfully defended his home against the attack of a Muslim mob, members of which he believed would have killed him had they gained entrance.[74]

The CRDD specifically found that the applicant was credible and that 'Pakistan's history of religious intolerance is well-documented and none of the parties, nor the CRDD, doubt it'.[75] It ruled, however, that the applicant's past experiences were not persecution, but only amounted to 'harassment and discrimination'.[76] The CRDD found it significant that although the applicant had been fired from his job he had been able to find work in the local Ahamdi community.[77] The federal trial court ruled that the CRDD had not committed a reviewable error, and dismissed the application for review.[78]

New Zealand

Cases from New Zealand are notable in explicitly invoking international human rights norms in the determination of 'discrimination-as-persecution' in religion-based claims. There are three decisions of the Refugee Status Appeals Authority (RSAA) which directly address the issue, and are representative of the tribunal's approach.

In a decision of the RSAA, *Refugee Appeal Number* 72350/2000,[79] the tribunal considered the claim of an Ahmadi from Pakistan. The facts are similar to those in the Canadian case, *Irfan Ahmed*, discussed above, but the decision supplies more details than those contained in the Canadian decision. The applicant in the N.Z. case was from a family that belonged

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In 1998, Human Rights Watch reported the following:

Pakistan's so-called blasphemy laws and other legislation regulating religious practice were used to harass, intimidate and punish religious minorities, particularly Christians and Ahmadis. As of July, more than 2 000 Ahmadis had been charged with various offenses under the laws. The laws contributed to a climate of violence against these groups. On June 19, Ateeq Ahmad Bajwah, an Ahmadi lawyer and local leader of the Ahmadiyya community, was shot and killed in broad daylight in Vihari, Punjab. At this writing, no one has been arrested for the murder. On October 10, retired High Court Justice Arif Iqhal Bhatti was shot and killed in his Lahore office. The murder was reportedly committed by a member of a militant Sunni Muslim organization who was enraged by Justice Bhatti's 1995 decision to acquit two Pakistani Christians accused of blasphemy.

Human Rights Watch World Report 1998, at ⟨*http://www.lswti.itgo.com/pakistan%20human%20rights.htm*⟩.

[74] *Ahmed v. M.C.I.* at section I.

[75] Ibid.

[76] Ibid. at section II.

[77] Ibid.

[78] Ibid. at section V.

[79] *Refugee Appeal No.* 72350/2000 (2001).

to the Ahmadi faith going back three generations. He grew up in Rabwah, the only predominantly Ahmadi town in Pakistan. On two occasions, he left Rabwah in attempts to pursue a higher education. On both occasions, he suffered beatings and threats by fellow students, and received no assistance from the college authorities or the police.[80] He also had employment difficulties; through friends of his family, he was able to secure a menial position, but aspired to 'obtain a better job with better qualifications'[81] which he was not able to do in Rabwah because of limited opportunities there. In addition to the discrimination he suffered in education and employment, he was assaulted in the vicinity of an Ahmadi mosque under circumstances that led him to believe it was because of his Ahmadi faith.[82] The RSAA ruled that cumulatively the discrimination he encountered did not rise to the level of persecution.[83]

In an earlier decision, *Refugee Appeal Number* 1039/93,[84] the RSAA had examined the issue of discrimination for reasons of religion, and its intersection with rights to privacy and family. The case involved a mixed couple from Malaysia. Under Malay law a Moslem can only marry within his faith. The male applicant was Moslem by birth and could not renounce Islam without severe consequences,[85] while his wife was Buddhist. They had met in Malaysia, but aware of the prohibition on inter-religious marriage, had come to New Zealand, married and sought asylum there.[86] If they had remained in Malaysia, their options would have been: 1) the wife's conversion to Islam, which she opposed, especially due to its gender-related restrictions; 2) co-habitation without marriage, exposing them to jail or a fine,[87] depriving the female applicant of marital rights and rendering any children born illegitimate.[88] In finding that the discrimination did rise to the level of persecution, the RSAA found it significant that freedom of thought, conscience and religion is a non-derogable and 'first hierarchy' right,[89]

[80] Ibid. at para. 16–17.
[81] Ibid. at para. 18.
[82] Ibid. at para. 19.
[83] *Refugee Appeal No.* 72350/2000 at para. 51.
[84] *Refugee Appeal No.* 1039/93 (1995).
[85] The applicants 'gave evidence that it would not be possible for [the husband] to renounce Islam as the procedures prescribed in Malaysia are extremely difficult and the would-be apostate encounters hostility and bureaucratic obstruction'. Ibid. at 4.
[86] Ibid. at 2–4.
[87] Ibid. at 4.
[88] Ibid. at 12.
[89] Ibid. at 11. James C. Hathaway's suggested framework for defining persecution incorporates a human-rights based hierarchy of rights; the more fundamental the right, the stronger the presumption that its violation constitutes persecution. Using the UDHR and the ICCPR as his framework, Prof. Hathaway attributes first hierarchy status to non-derogable rights, second hierarchy to binding but derogable rights; third hierarchy to UDHR rights which are carried forward in the International Covenant on Economic, Social and Cultural Rights (ICESC) and fourth hierarchy to rights in the UDHR, which are not codified in the ICCPR or ICESC. Hathaway, n. 9 above, 109–11.

and that in this case the other significant rights of privacy and family were implicated.[90] The RSAA also ruled that the benefit of the doubt was to apply to the determination of 'whether ... discrimination ... crosses the threshold to persecution'.[91]

In *Refugee Appeal Number* 70165/96,[92] the RSAA again considered a case of discrimination for reasons of religion in Malaysia. The applicants were of Indian ethnicity and Catholic faith. Their claim was based primarily on the employment discrimination the male applicant had experienced and policies affecting their children's religious education — namely, that Christian religious education was no longer available at state schools, that their children were encouraged to learn Arabic so they could read the Koran, and that they were teased by Muslim students.[93] The RSAA invoked the UNHCR *Handbook* provisions and found that there were not 'consequences of a substantially prejudicial nature' where the male applicant was always able to work, that the children could secure Christian religious instruction at home and at church, and that therefore the cumulative measures did not constitute persecution.[94]

United Kingdom

One case from the United Kingdom, *Moezzi v. Secretary of State*,[95] directly raises the issue of discrimination as persecution; it presents facts similar to those in the first of the New Zealand cases dealing with couples of mixed religion from Malaysia discussed above. Moezzi was an Iranian who married an Indian national of the Hindu faith. If the applicant's wife did not abandon her faith, the marriage would not be recognized and their child would be treated as illegitimate.[96] The Court of Appeal dismissed Moezzi's appeal, upholding the Secretary of State's ruling that this was 'a risk of discrimination as compared with a risk of persecution'.[97] Unfortunately there is no analysis to indicate what criteria the Court may have considered in reaching that conclusion.

The decisions in this section represent a range of approaches. The New Zealand decisions make a contribution in highlighting the utility of

[90] *Refugee Appeal No.* 1039/93 at 12. Art. 17 of the ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference.

Pursuant to Prof. Hathaway's framework, the rights of privacy and family are second hierarchy in that they are binding, but derogable.

[91] *Refugee Appeal No.* 1039/93 at 13.

[92] *Refugee Appeal No.* 70165/96 (1997).

[93] Ibid. at 4.

[94] Ibid. at 6.

[95] *Moezzi v. Secretary of State for the Home Department* (6 Oct. 1988) (C.A.), available at ⟨*http://www.lexis.com*⟩ (visited 12 July 2002).

[96] Ibid. at 3.

[97] Ibid. at 4.

considering whether discrimination related to religion also implicates other protected rights. However, it is not suggested in this paper that the New Zealand approach be the sole dispositive test as to when discrimination constitutes persecution. It is suggested, and set forth below, that the New Zealand approach supplement the guidance in UNHCR *Handbook* paragraphs 54 and 55 as follows:

- An analysis of discrimination in religion-based claims should have as its point of departure the principle that pursuant to international norms, any form of discrimination on the basis of religion is impermissible.
- In determining whether discrimination for reasons of religion constitutes persecution, the guidance in UNHCR *Handbook* paragraphs 54 and 55 should be applied. UNHCR *Handbook* paragraph 54 looks to whether the 'measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned' and give the examples of 'serious restrictions on [the] right to earn livelihood ... [and] access to normally available educational facilities'.
- An additional factor that should be considered is whether the discriminatory measures have the effect of seriously limiting the individual from fulfilling his or her human potential (that is, where an individual is able to earn a livelihood, but does so in a situation of being consigned to menial work regardless of higher qualifications).
- Where the discriminatory measures implicate other fundamental protected rights, such as the right to family or privacy, there shall be a presumption that they constitute persecution.

Serious Physical Harm; Persecution Distinguished from Discrimination

Although in several of the cases in the preceding section, the discriminatory measures were accompanied by physical harm, the claims centered more on the non-physical harms (that is, the limits on education, employment, marriage rights, etc.) and the interpretive issues involved in determining when discrimination rises to the level of persecution. In this section the focus shifts to cases where serious physical harm, and other threats against the physical integrity of the individual constituted the core of the claim. A survey of the cases reveals that tribunals often characterize physical harms as 'mere discrimination' or 'harassment'. This characterization has precluded protection in that neither discrimination nor harassment are sufficient to establish a claim for protection; persecution is required.

United States

In a number of decisions, the Board of Immigration Appeals (BIA) ruled that serious physical harm constituted harassment or discrimination, but

did not rise to the level of persecution. Although these decisions were subsequently reversed on appeal, they are significant for illustrating a troubling confusion between the terms discrimination and persecution.

For example in *Korablina v. INS*, [98] the BIA upheld the denial of asylum to a Jewish applicant from the Ukraine, characterizing the harm she suffered as discrimination, not persecution. Because of her religion, the applicant, Vera Korablina, had been limited in her educational and employment opportunities, had been fired from work, received numerous anti-Semitic telephone calls and notes threatening to kill her, and on one occasion was tied up with a noose placed around her neck, which left her 'barely breathing and in a state of shock' requiring hospital treatment for a brain concussion.[99] All of this occurred in an environment in which other Jews had been beaten, subject to extortion, and disappeared after going to the authorities.[100] After Ms Korablina fled the Ukraine her husband was beaten while being subjected to anti-Semitic epithets, and her daughter was attacked and threatened with rape under the same circumstances.[101] In reversing the BIA's denial, the Ninth Circuit Court of Appeals ruled that a *single* specific threat on an applicant's life, in conjunction with other relevant evidence regarding country conditions would be sufficient to establish *prima facie* eligibility, and that in Ms Korablina's case there had been far more than a single threat.[102]

Canada

Decisions in Canada at the administrative level (CRDD), appear to demonstrate the same failure as the U.S. BIA to distinguish properly between discrimination and persecution. *Ioda v. Canada (M.E.I.)*[103] is

[98] *Korablina v. INS* 158 F.3d 1038 (9th Cir. 1998).
[99] Ibid. at 1042.
[100] Ibid.
[101] Ibid. at 1042–43.
[102] *Korablina v. INS* at 1045. Other federal circuit courts of appeals have appeared to adopt a position closer to that of the BIA than of the Ninth Circuit Court of Appeals in evaluating whether serious physical harm rises to the level of persecution, although these cases were ultimately decided on other issues. See, for example, *Kossov v. INS*, 132 F.3d 405 (7th Cir. 1998) where the asylum applicant claimed asylum from both Latvia and Russia, and the Seventh Circuit ruled that if it were only from Latvia the court would most likely uphold the BIA's denial (*Kossov v. INS* at 408) notwithstanding the fact that in Latvia the applicant had been 'threatened by police, detained, interrogated, fired from her two jobs, had bank accounts mysteriously closed ... lost her business and her home' and on one occasion had been beaten by government agents until she miscarried her unborn child while the agents taunted her about her Evangelical Christian beliefs. *Kossov v. INS* at 409. *Bucur v. INS*, 109 F.3d 399 (7th Cir. 1997) involved the claim of a Romanian Jehovah's Witness who applied for asylum after there were changed conditions in his country, such that he would have to establish 'severe' past persecution in order to be granted relief. The court characterized as 'mild' the harm he had suffered, which included being forbidden to practice his religion, being subjected to threats and beatings throughout his school years, being 'beaten, starved and tortured' for attempting to escape, and subsequently being kept under surveillance and arrested and beaten on a number of occasions. *Bucur v. INS* at 404.
[103] *Ioda v. Canada (Minister of Employment & Immigration)* [1993] 65 F.T.R. 166.

illustrative of this characterization of physical assaults as discrimination. *Ioda* involved the claim of a Latvian Catholic married to a Jew from Belorussia, who suffered harm at the hands of Russians and Latvians alike after the disintegration of the Soviet Union.[104] The wife was beaten, received more than fifty anonymous threatening notes; she and her husband lost their employment, their son was beaten on several occasions, and their home was defaced with anti-Semitic graffiti.[105] The Refugee Division had ruled that what the family had experienced were 'unpleasant incidents'; that the incidents evinced 'discrimination and prejudice' but did not constitute persecution, even considered cumulatively.[106] The Federal Court allowed the application for appeal, noting the importance of considering the beatings of the son, the anti-Semitic vandalism, and the impact the hostile social climate had on the couple's ability to work.[107]

United Kingdom

The case of *Doudetski v. Secretary of State*[108] was also a claim involving serious physical harm in a climate of hatred and prejudice in which the higher tribunal (the Immigration Appeal Tribunal) reversed the erroneous finding of the first adjudicator on the issue of whether serious physical harm constituted persecution.

The applicant was a citizen of Russia whose father was Jewish. Because of his Jewish origin, he had been subject to a life-time of discrimination, assaults and beatings. The most serious incident occurred in 1993 on a train platform; the applicant was attacked and fell from the platform to the tracks, losing consciousness.[109] In ruling that he did not qualify for protection, the Special Adjudicator stated that 'he was not satisfied that the past treatment and the severity of the attacks ... were sufficient to constitute past persecution ... or to indicate a reasonable likelihood of future attacks amounting to persecution by reason of their severity and/or frequency'.[110] As an alternative basis, the Special Adjudicator ruled that the applicant did not have a well-founded fear because under current country conditions the state authorities provided adequate protection.[111] The Immigration Appeal Authority ruled that the Special Adjudicator had erred on both the

[104] As will be discussed in Part 3.4.3.6, claims involving religion often implicate overlapping grounds. This case implicated issues of religion and nationality, and the Federal Court suggested that the 'particular social group' ground was appropriate given the factor of the mixed marriage. *Ioda v. Canada* at para. 16.

[105] Ibid. at para. 3.

[106] *Ioda v. Canada* at para. 6.

[107] Ibid. at para. 14–15.

[108] *Doudestski v. Secretary of State for the Home Department* (29 June 2000) (I.A.T.); available at Electronic Immigration Network ⟨*http://www.ein.org.uk/index.html*⟩ (visited 18 July 2002).

[109] Ibid. at para. 5.

[110] Ibid. at para. 11.

[111] Ibid. at para. 12.

finding of no persecution and of adequate state protection, and allowed the appeal.[112]

In the three cases described herein (which are not unrepresentative of other decisions from these States), the adjudicator at the earlier level of decision-making concluded that physical assaults and beatings, carried out in a climate of hatred and prejudice, did not amount to persecution. In all three cases the error was corrected by a higher tribunal. However, the fact that such decisions could be made underscores the need for additional guidance where physical harm is involved. The UNHCR *Handbook*, paragraph 51, recommends that an inference of persecution always arises from a threat to life or freedom.[113] The following proposal incorporates the spirit of *Handbook* paragraph 51, as well as other relevant authority on the issue, namely that: Serious harm in the form of an assault or attack on the physical integrity of an individual is presumed to constitute persecution, and the presumption of persecution applies even if the harm was not repetitive or ongoing.

Limitations or Restrictions on Religion; When do Such Limitations or Restrictions Constitute Persecution?

As discussed in Part 2.2.2, freedom of religion or belief protects private as well as public manifestation of belief. The former is absolute, and the latter is subject only to narrow limitations. Numerous religion-based claims for protection arise out of violations in the form of limitations or restrictions on private belief or public manifestation. In determining these claims, the issue for the adjudicator is whether the limitations or restrictions constitute persecution.

As the cases discussed in this section illustrate, limitations or restrictions may range from total bans on specific religions to prohibitions on specified activities by the religion's adherents. Proselytizing is the most common activity to be limited or restricted. The impact of a total ban may not always be considered by tribunals to constitute persecution; in such cases, the issue arises as to whether the individual could still practice by doing so privately or in secret. In cases involving limitations on specific practices — such as proselytizing — the tribunals evaluate whether such restrictions are of sufficient gravity to be considered persecution. Although the tribunals reviewed for this section often — but not always — reached decisions in harmony with international norms, they did not appear to have a consistent approach, based on a clear understanding of the applicant's religion, and the importance of particular practices.

[112] Ibid. at para. 25.

[113] '[I]t may be inferred that a threat to life or freedom on account of [the Convention grounds] is always persecution'. *UNHCR Handbook*, n. 22 above, para. 51.

A restriction on religious practice which was noted in Part 3.1.2.1 above, is that imposed on the Ahmadis in Pakistan. It bears mentioning at this point that in none of the countries surveyed are the limits on Ahmadi practice (that is, forbidding them from identifying themselves as Muslim, referring to their faith as Islam, preaching or proselytizing in any way) considered *per se* persecutory such that the asylum seeker would not have to show additional facts in order to qualify for protection.

United States

It is well-accepted in principle in U.S. law that a total ban on religion constitutes persecution.[114] However, there are very few U.S. decisions actually decided on the basis of a total ban, or on the existence of restrictions or limitations. Cases relevant to the issue include *Doe v. INS*,[115] where the court remanded a case back to the Board for further consideration finding evidence of eligibility on the basis of the well-documented restrictions on unofficial religions in China; *Hartooni v. INS*,[116] referring to the persecution of Armenian Christians in Iran where their schools were closed, their churches stoned, and they were prohibited from celebrating Christmas; and *Dhine v. INS*,[117] describing the persecution of Jews in Ethiopia as including closing their religious schools and confiscating their religious materials.

Canada

Five Canadian cases have directly involved limitations and restrictions on practice. Three cases, *Fosu v. Canada*,[118] *Okyere-Akosah v. MEI*,[119] and *Irripugge, Mendis and Qiu v. Minister of Citizenship and Immigration*[120] involved total or near-total bans. In *Fosu* the government of Ghana suspended the public activities of the Mormons and the Jehovah's Witnesses.[121] When the applicant, a Jehovah's Witness, attempted to study the Bible at the home of a fellow church member, he was arrested; subsequently his home was searched and religious materials confiscated.[122] The Federal Court of

[114] *Bucur v. INS*, 109 F.3d 399, at 405 (7th Cir. 1997) ('it is virtually the definition of religious persecution that the votaries of a religion are forbidden to practice it').

[115] *Doe v. INS*, 867 F.2d 285 (6th Cir 1989).

[116] *Hartooni v. INS*, 21 F.3d 336, 341 (9th Cir. 1994).

[117] *Dhine v. INS*, 818 F. Supp 671, 674 (SDNY 1993) (reversed on other grounds by 3 F.3d 613 (2d Cir. 1993)).

[118] *Fosu v. Canada (Minister of Employment & Immigration)* [1994] 90 F.T.R. 182.

[119] *Okyere-Akosah v. M.E.I.* [1992] 33 A.C.W.S. (3d) 1119; also available at 1992 A.C.W.S.J. LEXIS 32486.

[120] *Irripugge, Mendis & Qiu v. Canada (Minister of Citizenship and Immigration)* [2000] Docket: IMM-2784–98; IMM-2969–98; IMM-2089–98 available at ⟨*http://decisions/fct-cf.gc.ca*⟩ (visited 13 June 2002).

[121] *Fosu v. Canada*, at para. 2.

[122] Ibid.

Canada allowed the appeal, finding that the Refugee Division had not properly evaluated whether the restrictions constituted persecution when it had simply concluded that the restrictions were 'entirely different from banning someone to [*sic*] pray God or to study the Bible'.[123]

Okyere-Akosah also involved a claim from Ghana. The applicant was a member of the Council of Elders in the Nyame Sompa Church, a Protestant church. The church was banned, members were arrested, and government agents came to the applicant's house searching for him.[124] The Federal Court of Appeal allowed the appeal, finding that the Board had not considered 'the totality of evidence' when it found the facts insufficient to support a claim of religious persecution.[125]

Irripugge, similar to the U.S. *Doe* decision, arose out of China's prohibition on unofficial religious practice. The applicant, Mao Chun Qiu, testified that he worshipped secretly in order to avoid arrest.[126] The CRDD had ruled that since Mr Qui could practice (by doing it in secret) he had not been persecuted.[127] The Federal Court quashed the decision, finding it to be incorrect.[128]

Kassatkine v. Canada[129] raised the issue of the prohibition of proselytizing.[130] The asylum seekers were evangelical Baptists in Moldova. Their religion required public proselytism, which was forbidden under Moldovan law.[131] The Federal Court quashed the decision denying relief, stating that: 'A law which requires a minority of citizens to breach the principles of their religion, to be lifelong outlaws, is patently persecutory. One might add, so long as those religious tenets are not unreasonable as, for example, exacting human sacrifice or the taking of prohibited drugs as a sacrament'.[132]

In *Abdul Majid Butt v. Canada*,[133] a ruling which appears inconsistent with *Kassatkine*, if not wholly perverse, the Federal Court declined to quash a decision denying refugee protection to an Ahmadi from Pakistan. In addition to Ordinance XX, there was documentary evidence that the Ahmadi community had been 'harassed and persecuted'[134] and the

[123] Ibid. at para. 2–5.
[124] *Okyere-Akosah v. M.E.I.* at para. 1.
[125] Ibid. at para. 14.
[126] *Irripugge, Mendis, & Qiu v. Canada* at para. 46.
[127] Ibid. at para. 48.
[128] Ibid. at paras. 51, 55.
[129] *Kassatkine v. Canada (Minister of Citizenship and Immigration)* [1996] 65 A.C.W.S. (3d) 480; also available at 1996 A.C.W.S.J. LEXIS 140265.
[130] It also raised the issue of religiously motivated conscientious objection, but that will be discussed in Part 3.4.3.1.
[131] *Kassatkine v. Canada* at para. 5.
[132] Ibid. at para. 10.
[133] *Butt v. Canada (Solicitor General)* [1993] 42 A.C.W.S. (3d) 873; also available at 1993 A.C.W.S.J. LEXIS 49451.
[134] Ibid. at 2.

applicant, described in the decision as a 'devout Ahmadi Muslim' testified that he and his family had suffered 'incidents of discrimination and attacks'.[135] In ruling that the restrictions did not constitute persecution, the CRDD held that Ordinance XX: 'does not prohibit or condemn the Ahmadis, but only restrict their acts of worship and religious belief'.[136]

New Zealand

Six decisions in New Zealand have involved either total bans or limitations/restrictions on practice. In four of the cases, relief was granted; in two it was denied because the restrictions were not considered unreasonable.

The case raising the issue of a total ban was *Refugee Appeal Number* 300/92,[137] which involved an Iranian who had become a member of the Hare Krishna movement, forbidden in Iran. In finding for the claimant, the tribunal referred to the fact that '[i]t is the ... total inability to *practise* his religion which distinguishes this case from those where the practice of a religion is possible, but subject to the qualification that proselytizing is forbidden'.[138]

The New Zealand tribunals have granted protection in some cases where the individuals would be at risk of persecution if they proselytized, but not if they kept their religious beliefs to themselves. For example, it ruled in favor of Christians from Iran where the 'particular faith which the family have embraced is one which is, by Christian terms, particularly zealous and which apparently encourages proselytising'.[139] It also found for a Baptist from Iran where the applicant has a 'pre-disposition to discuss her faith with others',[140] and for an ethnic Korean Christian from China who was 'the kind of individual who is likely to become involved in proselytising his religion ... , it being his deeply held belief that it was the "will of God" to promote such teachings'.[141]

In two other cases some degree of limitation — on proselytizing, or on activities more broadly defined than proselytizing — have not been found to constitute persecution. In an Ahmadi case from New Zealand discussed above in Part 3.1.2.1, the tribunal quoted from an earlier decision in

[135] Ibid. at 2–3.
[136] Ibid. at 3.
[137] *Refugee Appeal No.* 300/92 (1994), available at ⟨*http://www.refugee.org.nz/csearch.htm*⟩ (visited 19 June 2002).
[138] Ibid. at 3 [emphasis in original].
[139] *Refugee Appeal No.* 70720/97 (1998), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (visited 26 July 2002), at 9.
[140] *Refugee Appeal No.* 71066/98 (1999), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (visited 26 July 2002), at 7.
[141] *Refugee Appeal No.* 70692/97 (1998), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (visited 26 July 2002), at 22.

noting that it had consistently held that although 'Ahmadis were subjected to restrictions in the way that they were permitted to manifest their religion ... they were not prevented from practising their religion'.[142] The RSAA implied that Pakistan's restrictions on Ahmadis might not be violative of freedom of religion, but were permissible pursuant to Article 18.3 of the ICCPR.[143]

In another case,[144] involving an applicant from Bangladesh who claimed[145] to have converted to a Pentecostal or Evangelical faith, with the obligation to 'spread Christianity',[146] the RSAA again invoked Article 18.3, ruling 'We do not consider that it would be unreasonable for him to accept a restraint against proselytizing activities as Article 18(3) of the [ICCPR] itself qualifies the "right" to freedom of religion ...'.[147]

United Kingdom

The U.K. position on the issue has evolved since its earliest decision, *Atibo v. Immigration Officer.*[148] *Atibo* involved a Mozambican from a Moslem family who had converted to the Pentecostal church, and become an assistant pastor in his home country.[149] Proselytizing, particularly by adherents of protestant and evangelical churches, was restricted.[150] Without engaging in an analysis of the importance of proselytizing within the applicant's religion, or to him personally in his role as assistant pastor, the adjudicator refused the claim, and the IAT affirmed that decision.[151]

[142] *Refugee Appeal No.* 72350/2000 (2001), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (visited 26 July 2002), at para. 44.

[143] The RSAA quoted its earlier decision:

> While it is difficult to define the precise motives behind the passing of Pakistan's Ordinance XX of 1984 it appears clear from all the country information that is available that any attempts to propagate or manifest the Ahmadi religion in Pakistan in the face of the overwhelming Sunni Moslem majority is likely to provoke breaches of the peace and is likely in the minds of that majority to be detrimental to their fundamental rights in relation to their religion ....
>
> We are unable to find that the restriction upon the manifestation of Ahmadi religion in Pakistan amounts to persecution given the social conditions prevailing there and given the qualification imposed by Article 18(3) of the International Covenant on Civil and Political Rights on the right to freedom of religion. Ahmadis are not forbidden to practise their religion.

Refugee Appeal No. 72350/2000 at para. 46.

[144] *Refugee Appeal No.* 10/92 (1992), available at ⟨*http://www.refugee.org.nz*⟩ (visited 19 June 2002).

[145] There were questions of credibility regarding the conversion, but for the purposes of its analysis of the limits on proselytizing, the RSAA assumed the conversion to be genuine. *Refugee Appeal No.* 10/92 at 9.

[146] *Refugee Appeal No.* 10/92 at 9.

[147] Ibid.

[148] *Atibo v Immigration Officer, London (Heathrow) Airport,* TH/23674/78(1162) [1978] Imm AR 93; also available at ⟨*http://www.lexis.com*⟩.

[149] Ibid. at 2.

[150] Ibid. at 4.

[151] Ibid. at 6.

In *Ahmad v. Secretary of State*,[152] which involved the claim for asylum of Ahmadis from Pakistan subject to Ordinance XX, the Court of Appeal ruled that generally individuals could not qualify for protection if they intentionally violated laws regarding restrictions on their religious practice: 'a person cannot obtain refugee status on the basis that he has a fear of persecution if he returns to his national country and proceeds to break its laws'.[153] The Court [Farquharson J] qualified this rule by reference to the characteristics of the particular claimant, and of the limiting law, acknowledging that 'a priest may be different from that of an ordinary member of the community, or the offending statute itself may be so draconian that it would be impossible to practise the religion at all'.[154] On the facts of the case, the Court of Appeal refused the claim.

In a subsequent case, the Court of Appeal again considered the prohibition on Ahmadis in Pakistan.[155] The claim involved the ban on proselytizing in the context of an internal flight alternative.[156] The applicant had been severely persecuted in his village for his religion,[157] and he testified that if he returned and relocated, he would not stop speaking out; that 'he would still follow the command of his spiritual leaders and would still be vocal in his proclamation of Ahmadi beliefs'.[158] The IAT had refused on this basis, ruling that he had an internal flight alternative if he refrained from proselytizing or speaking out about his beliefs. The Court of Appeal disagreed and ruled that even if it was 'unreasonable'[159] for the applicant to continue speaking out, he was entitled to protection if speaking out resulted

[152] *Ahmad and Others v. Secretary of State for the Home Department* [1990] Imm AR 61 (CA); also available at ⟨*http://www.lexis.com*⟩.
Ahmad v. Secretary of State, at 5.

[153] Ibid.

[154] *Ahmed (Iftikhar) v. Secretary of State for the Home Department* [2000] I.N.L.R. 1 (CA); also available at 1999 WL 1071271.

[155] *Ahmed (Iftikhar) v. Secretary of State for the Home Department* [2000] I.N.L.R. 1 (CA); also available at 1999 WL 1071271.

[156] The principle of internal flight alternative (IFA) is discussed in Part 3.2.2.2; it provides that an individual who could avoid persecution by reasonably relocating within the country of feared persecution does not have a well-founded fear of persecution.

[157] The persecution was not minor; the case recounts that: '[W]hilst living in the village Khivewali which has about three thousand inhabitants he was on a daily basis subjected to harassment and a degree of physical violence including being spat at and stones being thrown at him ... he and his family were subjected to the most appalling treatment. His house was attacked and burned down on at least one if not two occasions'.

Ahmed v. Secretary of State at 2.

[158] *Ahmed v. Secretary of State* at 3.

[159] Although they were decided on other issues, two additional cases included language regarding this controversy over the measures that an asylum seeker might be expected to take in order to avoid persecution. For example, in *Yasmin v. Secretary of State for the Home Department*, [1999] EWCA Civ 1633, also available at ⟨*http://www.bailii.org*⟩ the IAT referred to the fact that 'most Ahmadis find it strategically advisable to maintain the lowest possible profile' and that the applicant in this case, a middle-aged woman, could avoid persecution because she would likely 'remain within the confines of her *home*'. Ibid. at 3. Her attorney had objected to this aspect of the ruling, arguing that 'there is no duty imposed upon an asylum seeker to keep a low profile in exercising the fundamental human right of

in a risk of persecution.[160] The fact that the asylum seeker had suffered the consequences of being faithful to his beliefs in the past was significant to the Court, which found his assertions that he would continue to proselytize and speak out it to be highly credible, rather than self-serving.[161]

Under international norms protecting the right to freedom of religion or belief, the manifestation of belief may only be limited or restricted in carefully circumscribed and narrow circumstances. As detailed in Part 2.2.2, Article 18.3 of the ICCPR sets forth specific and exhaustive criteria; limitations are permitted only when 'prescribed by law and ... necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.[162] In determining whether limitations or restrictions are persecution, therefore, tribunals should keep in mind the strong preference towards unfettered practice, as well as the specific criteria of Article 18.3. A serious question is raised by language in several decisions which appears to imply that the existence of bias and prejudice towards a religion might constitute a sufficient Article 18.3 basis for limiting manifestation of the disfavored religion or belief.[163]

In addition, in determining whether requiring an individual to refrain from a religious activity is persecution or not, the tribunal must be particularly cognizant of the significance of that activity within a particular religion, as well as its significance to the particular adherent. Several of the decisions from New Zealand and the U.K. appear to adopt this approach (although it does not appear to be evenly applied), which is elaborated upon in the following recommendation:

- Internationally accepted norms on freedom of religion or belief should inform the determination whether limitations or restrictions constitute persecution.
- ICCPR 18.3 prohibits limitations or restrictions which are not prescribed by law and necessary for public safety, order, health or morals, or the fundamental rights and freedoms of others.

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freedom of conscience and religion[.]' Ibid. at 4. Because the appeal was refused for other reasons, the Court of Appeal did not directly address itself to this argument.

In *R v. Secretary of State for the Home Department, ex parte Arshad* [2000] (CA), available at ⟨*http://www.lexis.com*⟩ (visited 12 July 2002), the Special Adjudicator had ruled that the applicant could avoid persecution if he took 'sensible precautions along the lines of those which he has adopted in the past not to provoke trouble'. Ibid. at 2. The measures taken by the asylum seeker included fleeing from his hometown of Rabwah to escape arrest, living with a relative in Faisalabad, and then moving to Lahore and using a false name. Ibid. at 1. The Court of Appeal did not reach the issue as to whether it was reasonable to expect him to continue living in that manner to avoid persecution because it had not been properly raised as a procedural matter.

[160] *Ahmed v. Secretary of State* at 7.

[161] *Ahmed v. Secretary of State* at 6–7.

[162] ICCPR, n. 1 above.

[163] See, for example, *Refugee Appeal No.* 72350/2000 (2001) para. 46, quoted n. 142 above, in which the court appeared to justify limits on the Ahamdis in Pakistan because of Sunni Moslem hostility towards the Ahmadis.

- A presumption that the limitation or restriction constitutes persecution arises from the fact that such limitation or restriction would not be permitted subject to ICCPR Article 18.3. Additional factors that should be considered in determining whether the limitations or restrictions rise to the level of persecution should include:
  — the importance or centrality of the particular act within the religion; and
  — the subjective importance of the act to the individual given her history and background.
  The more central the act, or the more important to the individual, the more likely that limitations or restrictions upon it rise to the level of persecution.
- The issue of importance or centrality of an act to a particular religion would be greatly assisted by the testimony of experts on the particular religion at issue, while the issue of importance to the individual requires an inquiry into the details of the applicant's beliefs and practice.

Forced Compliance with Religious Norms; When does it Constitute Persecution?

In many religion-based claims the persecution complained of is being coerced or otherwise forced to comply with religious norms not of the individual's choosing. When does such forced compliance constitute persecution? Because cases of forced compliance increasingly arise in gender asylum claims, this issue will be addressed below in Part 3.4.3.3.

3.1.2.2 Non-State Agents/Failure of State Protection

As discussed in Part 3.1.1, although they are in the clear minority, there are State parties to the Convention that do not provide protection to victims of non-state agents unless the State is in some way complicit with the persecution. This complicity or accountability approach poses a significant obstacle to protection in that non-state actors are very frequently the perpetrators of religious persecution, in situations where the State is not complicit, but is simply not able to provide protection.[164]

None of the four countries surveyed for purposes of this paper subscribe to the complicity approach, but instead look to whether there has been a failure of State protection against persecution by non-state agents. Within that context, however, there are some tribunal decisions — most notably

[164] Reports of the U.N. Special Rapporteur have consistently noted the rise in intolerance and discrimination at the hands of non-state actors. See, for example, E/CN.4/2000/65, n. 7 above, para. 173; A/53/279, n.7 above, para. 85(c).

from New Zealand — which are more consistent with the rationale underlying the 'protection' view than others. For instance, the RSAA in New Zealand has held that where the police themselves have been involved in the persecutory acts, there is 'no question' of receiving police protection, that is, there is a failure of State protection.[165] In another case the New Zealand tribunal noted that it would apply the benefit of the doubt principle in determining whether the State could protect the applicant in the two locations relevant to her claim (New Delhi and Kashmir).[166]

In contrast to this approach is a U.K. decision where, notwithstanding police participation in the persecution, the tribunal held that there had been no failure of State protection.[167] The applicant in *Ehsan Hamid* had converted from Sunni Muslim to Ahmadi. He experienced threats of violence and hostility, was forced out of business, and was ultimately arrested on the basis of false charges. While he was in police custody he was assaulted and beaten.[168] The Special Adjudicator ruled that there was 'no police or official harassment' and that his beatings while in detention had likely been 'the actions of individual police officers'.[169]

Two subsequent decisions from the U.K. have been more protection oriented than *Ehsan Hamid.* In *The Queen on the Application of Bodzek,*[170] the High Court of Justice quashed a decision which had found no failure of state protection in circumstances where on eight separate occasions the police had failed to take any action in response to claims of anti-Semitic attacks against the Jewish Polish applicants.[171] And in *Kinuthia v. Secretary of State,*[172] the Court of Appeal quashed a decision which had held that the

[165] *Refugee Appeal No.* 71955/2000 (2000), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (visited 26 July 2002), at para. 28 (involving a Pentecostal Christian in Pakistan). The Federal Court of Canada applied this same principle when the persecution was at the hand of a police officer's son. See *Annan v. Canada (Minister of Citizenship and Immigration)* [1995] 3 F.C. 25, 27; also available at 1995 F.C. LEXIS 166 (Ghanian woman kidnapped and gang-raped by police inspector's son 'cannot expect protection from the police since it is the inspector's son who is still pursuing her[.]').

[166] *Refugee Appeal No.* 80/91 (1992) at 3, available at ⟨*http://www.refugee.org.nz/csearch.htm*⟩ (visited 19 June 2002).

[167] [167] *R v. Secretary of State for Home Department, ex parte Ehsan Hamid* [1997] EWCA Civ 2612; also available at ⟨*http://www.bailii.org*⟩.

[168] *Ehsan Hamid* at 2.

[169] Ibid. at 3 (Special Adjudicator's decision upheld by IAT; application for judicial review denied by CA).

[170] *The Queen on the Application of Bodzek v. Special Adjudicator* [2002] EWHC 1525 (Admin); also available at ⟨*http://www.ein.org.uk/index.html*⟩ (visited 2 Aug. 2002).

[171] Ibid. at 6. The Federal Court in Canada took a similar approach in *Haimov v. Minister of Citizenship and Immigration* 2001 FCT 665 (2001) where the Israeli police refused to protect a Russian Christian Orthodox woman from the brutal domestic violence of her Jewish husband. As described in the opinion, when the wife 'went to the police, the officer started to write a report but tore it up when he learned the conflict took place because the applicant and her husband were of different religions'. The court found that the state inability to protect led to presumptions of the well-foundedness of her fear. *Haimov* at para. 19.

[172] *Kinuthia v. Secretary of State for the Home Department* [2001] EWCA Civ 2100; also available at ⟨*http://www.ein.org.uk/index.html*⟩ (visited 18 July 2002).

availability of judicial recourse *after* abuse by governmental authorities was sufficient state protection.[173] In *Kinuthia* the applicant had been arrested for her religious beliefs on four separate occasions and had suffered 'maltreatment ... of a serious nature'.[174]

Thus, because of the pervasiveness of religious persecution by non-state actors, adherence to the accountability view severely limits protection from religious persecution. In addition, even in States where the protection view prevails, there can be a serious gap in protection if the adjudicators improperly determine that there has been State protection, even when there has been a failure of such protection. Therefore, an interpretive approach is recommended in which persecution within the meaning of the Refugee Convention includes persecution by the State as well as persecution by non-state agents in situations where the State is unwilling or unable to provide effective protection. Moreover, in cases where State agents participate in the actual persecutory acts, there is a presumption of a failure of State protection, which can only be rebutted by a strong showing of adequate and effective State protection.

3.2 Well-Founded

3.2.1 The Issue of 'Well-Founded' Fear in Religion-based Claims

The issue of well-founded fear arises in a number of specific areas in religion-based claims. For example, numerous cases involve asylum seekers who suffered past persecution, and raise the issue of the relevance of past harm to future risk. Because religious persecution may occur in contexts with polarized and geographically separate communities, the issue of internal flight alternative often arises.[175] Other cases focus on the question of 'mere membership' and whether it is ever sufficient to establish a claim. At least one case raises the issue of 'safe country' lists and their relationship to claims of religious persecution.

3.2.2 State Jurisprudence Regarding a Well-Founded Fear

3.2.2.1 The Relevance of Past Persecution to Establishing a Well-Founded Fear of Future Harm

Because the well-founded fear standard is to be determined on the basis of country conditions and patterns of persecution, the fact that an individual

[173] Ibid. at para. 20.
[174] *Kinuthia* at para. 4.
[175] UNHCR *Handbook* para. 91 provides that an applicant need not establish countrywide persecution in order to be recognized as a refugee, although the existence of a 'reasonable' internal flight alternative (IFA) could defeat the claim. UNHCR, *Handbook*, n. 22 above, para. 91. UNHCR's current position (which will be included in prospective guidelines on the issue) is that the question of an IFA is generally only relevant where the agent of persecution is a non-state actor, there is effective state protection in another part of the country which is physically, safely and legally accessible to the individual, and relocation would be reasonable under all the circumstances.

was harmed in the past is relevant to assessing his or her future risk. In the United States past persecution is considered such a strong indicator of future risk that there is a regulatory presumption that an individual who has been persecuted in the past has established a well-founded fear unless there has been 'a fundamental change in circumstances' in the country, or the person could avoid future persecution by relocating within the country, if relocation would be 'reasonable' under all the circumstances.[176]

Although none of the other three States surveyed for this paper have adopted such a presumption, they generally consider past persecution in assessing future risk. There are exceptions, and some cases in the United Kingdom are striking for the fact that they involve repeated and/or serious past persecution, in situations where there does not appear to have been any amelioration in country conditions, and yet protection is denied on failure to establish a well-founded fear. An example of such a decision is *Tahir v. Secretary of State*[177] in which the Court of Appeal dismissed the appeal of an Ahmadi husband and wife from Pakistan. The wife was a doctor and she had been deceived into responding to a night-time emergency call which turned out to be an ambush from which they escaped after being physically and verbally assaulted.[178] That incident was followed by men arriving at their residence and threatening death, which was then followed by the police coming to their home to arrest them, and, upon releasing them, giving them orders to report the next day. They fled at that point, and learned that after their departure, the police were searching for them since they had failed to report.[179] No well-founded fear was found on these facts.[180]

3.2.2.2 Internal Flight Alternative

In the United States, there are regulations addressing the issue of internal flight alternative. The regulations are partially consistent with the current UNHCR position[181] in providing that where the persecutor is the

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For an in-depth discussion of IFA and related issues, see, Jennifer Moore, 'From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents' (1999) 31 *Columbia Human Rights Law Review* 81, 103, n. 60.

[176] 8 C.F.R. § 208.13(b)(1)(i)(A) and (B).

[177] *Tahir and Another v. Secretary of State for the Home Department* [1995] (CA) available at ⟨*http://www.lexis.com*⟩.

[178] Ibid. at 2.

[179] *Tahir* at 2–3.

[180] Ibid. at 7.

[181] See n. 175 above; the UNHCR position is that: a) in cases where persecution is by State agents, there is a presumption of countrywide persecution and an alternate location is not a relevant consideration; b) in cases where persecution is by non-state agents, and the State has been unwilling to protect the claimant in one part of the country, it can be presumed that the State would be unwilling to extend its protection in any other part of the country; c) to be a relevant alternative, a potential area of relocation must be physically, safely, and legally accessible to the claimant; d) an individual may not be denied refugee status merely because he could have relocated to an IFA unless it

government or government-sponsored, a rebuttable presumption arises that 'internal relocation would not be reasonable ... '.[182] The regulations identify relevant criteria for determining whether it is reasonable to expect an individual to relocate within her country.[183]

The Canadian Immigration and Refugee Board has issued guidelines which adopt a 'reasonableness' standard in assessing the existence of an IFA.[184] Relevant factors include the 'state of infrastructure and economy in the IFA region ... and the stability or instability of the government that is in place there'.[185] It is recognized that an individual 'should not be required to suffer great physical danger or undue hardship in traveling to an IFA region, or in staying there'.[186]

The cases involving religion-based claims demonstrate a varied approach to assessing the existence and reasonableness of an IFA; some tribunals are far more diligent than others in examining the particular facts in determining the question of an IFA. For example, the Federal Court of Canada rejected the existence of an IFA in *Annan v. Canada.*[187] In finding there was no IFA for the Ghanaian asylum seeker, the Court took judicial notice of the small size of the country, its cultural norms, and the fact that the twenty-three year old Roman Catholic female applicant did not know where her parents were.[188]

The RSAA in New Zealand appears equally diligent in reviewing the specific facts of the asylum seekers' circumstances in determining an IFA. It has ruled that where claims based on religion also implicate other Convention grounds, the IFA must exist for the feared persecution related to each ground.[189] In other cases it has held that it would not be reasonable to

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would have been reasonable to expect him to do so; e) a determination of the reasonableness of an IFA requires an examination of all relevant criteria, including whether the individual can enjoy fundamental civil, political, economic, social and cultural rights as a citizen (or habitual residence for a stateless person) in the area of relocation, including economic survival, without facing an undue hardship; f) if the individual risks being persecuted, including any new form of persecution, it is not reasonable to expect relocation.

[182] 8 C.F.R. § 208.13(b)(3)(ii).

[183] The non-exhaustive list of criteria include: 'ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties'. 8 C.F.R. § 208.13(b)(3). In considering whether an IFA would be reasonable, UNHCR considers, *inter alia,* the ability of the individual to enjoy fundamental civil, political, economic social and cultural rights as a citizen in the area of relocation, including the ability to survive economically without undue hardship.

[184] Canadian Immigration & Refugee Board, Guidelines on Civilian Non-combatants Fearing Persecution in Civil War Situations (1996), available at ⟨*http://www.irb.gc.ca/en/about/legal/guidline/civillian/INDEX_E.htm*⟩.

[185] Ibid. in section entitled 'Internal Flight Alternative'.

[186] Ibid.

[187] *Annan v. Canada (Minister of Citizenship and Immigration)* [1995] 3 F.C. 25; also available at 1995 F.C. LEXIS 166.

[188] Ibid. at 30–31.

[189] See, for example, *Refugee Appeal No.* 2038/93 (1995), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (holding that a Nigerian Christian pastor who was also a pro-democracy activist

expect an asylum seeker to relocate where he had been detained and tortured by the police, and suffered trauma and abuse going back to his childhood.[190] The RSAA has also found that systems of registration which allow the government to locate an individual also preclude internal relocation (referring to the *propiska* system in the Ukraine).[191]

A recent U.K. decision[192] appears to apply a more stringent standard for asylum seekers claiming there is no IFA. The standard is whether it would be 'unduly harsh'[193] to require the applicant to relocate. The U.K. case involved an Ahmadi who had lived with his wife in Lahore, Pakistan, where, because of his religion, his factory had been burned down, he had been detained by the police, his wife had been terrorized during an attack on the family home, which resulted in her miscarriage and resulting inability to bear children, and he had received numerous death threats.[194] Without assessing the applicant's individual circumstances, the Court of Appeal per Staughton J. upheld the special adjudicator's use of the 'unduly harsh' standard and the ruling that the applicant could relocate in Rabwah because 'millions of [Ahmadis] live there ... [i]t depends on how they behave; what they do; and, as far as concerns religion, on the state of their religious activities'.[195] This decision on IFA is related to the discussion in Part 3.1.2.1 regarding restrictions on actions; it assumes that the applicant should limit or restrict the manifestation of religious belief to avoid persecution.

3.2.2.3 Mere Membership

In addressing religion-based claims, the UNHCR *Handbook* paragraph 73, notes that '[m]ere membership [in] a particular religious community will normally not be enough to substantiate a claim to refugee status'.[196] This guidance has its exceptions; obviously there can be country conditions such that all members of a particular group would be found to have a well-founded fear; the situation of Jews in Europe during World War II provides the most obvious example.[197] The application of the general rule that mere

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could not avoid persecution by relocating from an Islamic to a Christian majority region, because he would still be at risk there for his political beliefs and activism). Ibid. at 8.

[190] *Refugee Appeal No.* 70222/96 (1997) at 27, available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩.

[191] *Refugee Appeal No.* 70903/98 (1998) at 12–13, available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩.

[192] *R. v. Secretary of State for Home Department and others ex parte Rahman* [2000] (CA) available at ⟨*http://www.lexis.com*⟩. (The unduly harsh text dates from *Robinson* [1998] QB 929 and the CA was following Linder JA in *Thirunavukkaran* 109 DLR (4th) 682 at 687 (F.C. Canada). The CA also proposed following the E.U. Joint Position; could the applicant reasonably be expected to move.)

[193] Ibid. at 3.

[194] Ibid. at 2–3.

[195] *Rahman* at 3.

[196] UNHCR, *Handbook*, n. 22 above, para. 73.

[197] The only tribunal decision which appeared to hold that 'mere membership' was enough on the facts was *Dieguez v. Canada (Minister of Citizenship and Immigration)* [1999] Docket: IMM-1021–98

membership is not enough, however, appears to have led some tribunals to ignore the particular circumstances in individual cases,[198] or to reach the mistaken position that where all members of a particular group are persecuted, the applicant must be persecuted to a greater degree in order to establish a claim.[199] These are both misapplications of the general rule.

3.2.2.4 Safe Country of Origin

A number of European Union member states have written lists of safe countries of origin; claims for persons whose country of origin is considered safe are deemed manifestly unfounded, and are generally subject to accelerated procedures. One decision from the U.K., *Secretary of State v. Javed*,[200] makes the important point that countries that may be considered safe for a certain range of claims, may not be safe for claims based on religion. Until October of 2000, the U.K. maintained a list of safe countries, referred to as 'the White List'.[201] *Javed* involved judicial review of a decision by the then U.K. Home Office Minister Jack Straw to include Pakistan on the white list of safe countries. The Court of Appeal ruled that Mr Straw had erred in law and acted irrationally in including Pakistan on the list of safe countries. Although the Court of Appeal focused mostly on the position of women in reaching that decision, it also considered the situation of Ahmadis in reaching its conclusion.[202]

In sum, the relevance of past persecution to future harm, and the question of appropriate criteria to apply in cases of internal relocation

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available at ⟨*http://decisions/fct-cf.gc.ca*⟩ (visited 13 June 2002), quashing a CRDD decision. *Dieguez* involved a Seventh Day Adventist from Cuba. The CRDD had denied because the applicant was able to attend church, and had not personally had any difficulties. Ibid. at para. 4. In quashing the CRDD decision, the Federal Court noted that U.S. Department of State reports documented the many prohibitions and restrictions on religion and religious practice. Ibid. at para. 8.

[198] The issue of mere membership comes up frequently in Ahmadi cases where the existence of Ordinance XX is not found to be *per se* persecutory such that all Ahmadis have a well-founded fear. In order to establish a claim, the individual applicant must establish facts of persecution (beyond the existence of Ordinance XX). However it often appears that even when these facts are marshalled, the adjudicator invokes the general rule that not all Ahmadis are persecuted in Pakistan as a means of ignoring the individual facts of the case. See, for example, *Ghafoor Khan v. Secretary of State for the Home Department* [1999] EWCA Civ 1638 (CA), available at ⟨*http://www.bailii.org*⟩ (Court of Appeal refused application of Ahmadi threatened by police with arrest if he did not change his religion because 'there can be no blanket recognition of [Ahmadis] as refugees'). Ibid. at 4.

[199] See *Chen v. Canada (Minister of Citizenship and Immigration)* [1997] Court File No. IMM-1433-96, available at 1997 Fed. Ct. Trial LEXIS 696 (where Federal Court set aside the CRDD's decision that the Chinese applicant, who faced a 'short detention, fine, or re-education term' did not have a well-founded fear because he was not at more risk than others in his same situation). Ibid. at 5.

[200] *Secretary of State for the Home Department v. Javed, Ali, and Ali* [2002] (CA) Appeal No. C-2001-0291, available at ⟨*http://www.ein.org.uk/index.html*⟩ (visited 2 Aug. 2002).

[201] Ibid. at 2.

[202] Ibid. at 21. In *Islam & Shah* [1999] 2 AC 629 a number of the Law Lords were prepared to hold that all Pakistani women were members of a particular social group based on the entrenched gender discrimination in that society.

are the two principal issues related to 'well-foundedness' of fear which could benefit from the articulation of an analytical approach consistent with the commitment to protection for freedom of religion and belief. Adoption of the U.S. approach for the former, and a combination of the New Zealand and the UNHCR approach for the latter would result in improved protection. The necessary recommendation to implement such change follows.

- An individual who has suffered past persecution is presumed to have a well-founded fear of persecution, absent a showing of changed circumstances sufficient to negate the presumption.
- In cases where persecution is by State agents, it is presumed that persecution is statewide and an alternate location is not a relevant consideration.
- In cases where persecution is by non-state agents, it can also be presumed that if the State is unwilling to protect the claimant in one part of the country, it would also be unwilling to extend its protection in other areas.
- To be a relevant alternative, the area of relocation must be physically, safely, and legally accessible to the claimant.
- An individual may not be denied refugee status merely because he could have relocated to the IFA unless it would have been reasonable to expect him to do so.
- A determination of the reasonableness of an IFA requires an examination of all relevant criteria, including whether the individual can enjoy fundamental civil, political, economic, social and cultural rights as a citizen (or habitual residence for a stateless person) in the area of relocation, including economic survival, without facing an undue hardship.
- If the individual risks being persecuted, including any new form of persecution, it is not reasonable to expect relocation.

3.3 The Convention Ground of Religion

It is beyond the parameters of this paper to provide a comprehensive definition of 'religion or belief' as those terms are understood pursuant to international norms, or academic discourse.[203] An earlier section of this paper (Part 2.2.2) provided a brief overview of the meaning of 'religion or belief' which has been derived from the key international instruments. As therein noted, the drafters of the ICCPR intended to include beliefs such

[203] Professor Jeremy T. Gunn's excellent article, 'The Complexity of Religion and The Definition of "Religion" in International Law', 16 *Harv. Hum. Rts. J.* 189 (2003), addresses the difficulty of 'defining' religion, and puts forth a conceptual context and theoretical approach to 'understanding (rather than defining) religion'. I defer to his thorough treatment of the issue, which goes beyond the definitions derived from international norms, which I discuss herein.

as 'agnosticism, free thought, atheism and rationalism' under the rubric of 'religion or belief'. The European Union's Proposal for a Council Directive[204] reaffirms this approach and its applicability to defining religion within the context of the Refugee Convention. The E.U. proposal:

> ... [I]nstructs members States to interpret [religion] so as to include the holding of theistic, non-theistic and atheistic beliefs. Persecution on religious grounds may occur where such interference targets a person who does not wish to profess any religion, refuses to take up a particular religion or does not wish to comply with all or part of the rites and customs relating to a religion.[205]

As noted in the introduction (Part 1) there has been a growing number of new religions and religious minorities, and the recognition of certain belief systems as 'religions' has been a matter of controversy. Notwithstanding this fact, within the State jurisprudence surveyed for this paper, there were a relatively small number of cases in which the characterization of a belief system was at issue; those cases generally involved new or 'non-mainstream' religions. This section reviews the cases — all from Canada and the U.K. — and demonstrates the various tribunals' approaches to defining 'religion'.

Canada

Of all the State decisions reviewed, the one with the most extensive and instructive analysis is *Hui Qing Yang.*[206] The applicant, a thirty-seven year old woman, fled China out of fear of persecution for her practice of Falun Gong. She had testified that Falun Gong was 'essential for her to cope with problems in her life'[207] and that she had been suicidal until she had discovered the practice. In her personal statement submitted as part of her application, she had written:

> I recognised the true meaning of my life and got my spiritual encouragement by practising Falun Gong. It enriched my cultural life and improved my health as well. Since I started practising Falun Gong, I have changed a lot. The principles of practicing is (sic) Truth — Compassion — Forbearance or Tolerance. Truth means to tell the truth. Compassion means to do good deeds for people and to be a kind person. Forbearance or tolerance means to endure the humiliation that normal people can not endure. As a Falun Gong practitioner and as a Chinese Citizen (sic), I believe the principle of treating people nicely. I obey the laws and regulations. I try to do good deeds for people and I try to be useful to the country and society and to be helpful to other people.[208]

[204] Commission of the European Communities, Proposal for a Council Directive, n. 50 above.
[205] Ibid. at 21, Art. 12(b).
[206] *Hui Qing Yang v Canada (Minister of Citizenship and Immigration)* [2001] FCT 1052, also available at ⟨*http://www.canlii.org/ca/cas/fc/2001/2001fct1052.html*⟩.
[207] Ibid. at 2.
[208] Ibid. at 4–5.

The CRDD had rejected her claim, ruling, *inter alia*, that Falun Gong was not a religion, and the case was appealed to the Federal Court. The court began its analysis by recognizing that Canadian jurisprudence had not defined 'religion' for purposes of its Immigration Act, but that guidance was provided by international law norms and scholarly writing on the issue. The court looked to the writings of James Hathaway, the UNHCR *Handbook*, relevant treatises,[209] and the Canadian Encyclopedia. After canvassing this extensive authority, it concluded that the CRDD had erred in denying that Falun Gong was a religion. Relevant, but not dispositive, was the fact that the government of China considered Falun Gong to be a religion.[210]

In *Ademokoya v. Canada*,[211] the relative obscurity of a religion resulted in an initial denial by the CRDD, which was reversed by the Federal Court. The applicant, a devout Christian, feared persecution from the Ogboni Lodge Fraternity. His fear arose from their threats and attacks following his refusal to join them, as required so to do upon his father's death.[212] In denying, the CRDD had confused the Ogboni Lodge Fraternity (which could be a source of persecution) with the Reformed Ogboni Fraternity (ROF) which was not considered to be persecutory.[213]

Bodoeva v. Canada,[214] also involved a religion — the Ezid — which is non-mainstream. As a consequence, there was no documentation regarding the situation of persons practising the religion in the country of feared persecution, Georgia. Because of the lack of documentation, the Refugee Division 'had to proceed by analogy and look at the treatment given to other religions in Georgia'[215] to determine the risk of persecution to the applicants. The Federal Court upheld this approach as legitimate and dismissed the appeal.[216]

[209] The court quoted from *Immigration Law and Practice* by Lorne Waldeman, as follows:

In addition, the concept of religion should be broadly interpreted to allow for claims based on a person's religious beliefs, even if those are not part of an organized religion. This can even be extended to cover cases where a person's religious beliefs are such that he or she rejects religion altogether. If a person is persecuted by reason of such a belief, then there will be a sufficient nexus to the claim. This position was adopted by the Australian High Court in the case of *Okere v. Minister for Immigration and Multicultural Affairs*, where the court accepted a claim based on religion where the person was not persecuted because of his participating in a specific religion, but rather because of his refusal to do so. Ibid. at 3.

[210] The court ruled that '[i]f Falun Gong is considered by the Government of China to be a religion, then it must be so for the purposes of the instant claim'. Ibid. at 5.

[211] *Ademokoya v. Canada (Minister of Citizenship and Immigration)* [2001] FCT 1398; also available at ⟨*http://decisions.fct-cf.gc.ca*⟩.

[212] Ibid. at para. 4.

[213] Ibid. at para. 8.

[214] *Badoeva v. Canada (Minister of Citizenship and Immigration)* [2000] Docket: IMM-4925–99, available at ⟨*http://decisions.fct-cf.gc.ca*⟩ (visited 12 June 2002).

[215] Ibid. at para. 21.

[216] *Badoeva* at para. 32.

In *Oloyede v. Canada*,[217] the Federal Court of Canada upheld the denial of refugee status to the applicant who feared a 'vampire cult' in Nigeria. Similar to the *Ademokoya* case, the asylum seeker, a devout Christian, feared the group because of threats and attacks upon his refusal to join. The cult had shot and killed his mother, burned down one of his father's businesses, and blown up his car.[218] The denial was based on the finding that the applicant 'had been subjected to cult criminal activity rather than religious persecution . . .'.[219]

United Kingdom

In *Kinuthia v. Secretary of State*,[220] the U.K. Court of Appeal considered the claim of a Kenyan woman who was an adherent to a traditional religion, the Mungiki. She had been arrested and mistreated on a number of occasions because of her religious membership.[221] In adjudicating her claims, the IAT had referred disparagingly to the Mungiki.[222] Although it was not the basis for allowing her appeal, the Court of Appeal [Pill J] criticized the IAT for its approach:

> I do not see the relevance to the present case of the tenets of the religion to which the appellant wishes to adhere .... In considering whether there is persecution on Convention grounds, it does not appear to me relevant in the present case to consider the attitude of the adopted religion to other religions or what the international community may think of it.[223]

It can be seen, therefore, that there are several difficulties arising with respect to the Convention ground of religion. Where the belief or practice is relatively new, the tribunal may face the difficult question of characterizing it as a religion or not. If the belief is one that arouses hostility on the part of the factfinder at some level (such as the *Kinuthia* decision), there is the possible issue of bias. Finally, where the religion or belief is relatively new or non-mainstream, there may be a dearth of information necessarily to evaluate the well-foundedness of the fear. Thus:

- In determining whether a belief or practice is a 'religion' as that term is defined in international law, a factfinder is to be guided by the relevant international authority which gives meaning to the term.

[217] *Oloyede v. Canada (Minister of Citizenship and Immigration)* [2001] FCT 255; also available at ⟨*http://decisions.fct-cf.gc.ca*⟩.
[218] Ibid. at para. 3.
[219] Ibid. at para. 8.
[220] *Kinuthia v. Secretary of State for the Home Department* [2001] EWCA Civ 2100; also available at ⟨*http://www.ein.org.uk/index.html*⟩ (visited 18 July 2002).
[221] Ibid. at para. 4.
[222] Ibid. at para. 8.
[223] *Kinuthia* at para. 9.

- Relevant authority includes, but is not limited to: the UDHR, the ICCPR, relevant General Comments issued by the U.N. Human Rights Committee, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, and the body of reports by U.N. Special Rapporteurs.
- In determining whether a particular belief or practice is a 'religion' a factfinder should also consider whether the agents of persecution consider it to be a religion, because an individual can be persecuted on the basis of imputed, as well as actual religious affiliation or beliefs.
- In light of the cultural and sociological complexities which inhere in defining a practice as a religion, or determining whether persecutors consider it as such, a factfinder is encouraged to seek out the assistance of professionals with relevant expertise on the issue.

3.4 For reasons of/Nexus

3.4.1 The Nature of the Required Causal Link

The refugee definition requires that the feared harm be 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'. The phrase 'for reasons of' connotes a nexus or causal relationship between the feared harms and one of the five grounds. The Convention is silent regarding the nature of the causal relationship. Although the UNHCR *Handbook* addresses nexus generally at paragraphs 66 and 67,[224] it does not elaborate on the nature of the causal relationship. The issue of nexus, and how it is determined has become of increasing importance — and controversy — in the adjudication of refugee claims, and has become in some States the overwhelming basis for denial of claims for protection.

Nexus is of tremendous significance in claims based on religion or belief. Any nexus test which requires extensive and detailed proof of the relationship between the feared persecution and the asylum seeker's religion poses a potentially unsurmountable obstacle to protection. As noted in Part I above, religious persecution is often the result of 'complex, multifaceted and intertwined' factors, and occurs in socio-political contexts where it is difficult to separate the bias towards religion from other political or ethnic causes. Under these circumstances, imposing an overly rigorous or inflexible test to establish nexus is likely to result in failed protection for the victims of religious persecution. In addition, as discussed below, there are some formulations of the nexus test — such as an intent-based formulation — which are *prima facie* inadequate to protect the fundamental right to freedom of religion or belief.

[224] UNHCR, *Handbook*, n. 22 above, para.66–67.

3.4.2 Divergent Approaches to Interpreting 'For Reasons Of'

Because of the lack of interpretive guidance on causation in the Convention, its *travaux préparatoires*, and the UNHCR *Handbook*, tribunals have often looked towards standards of causation existing in other jurisprudential areas. They have adopted various approaches,[225] with some States requiring proof of intent or motivation of the persecutor, others focusing on the effect rather than the intent, and still others eshewing any specific formula in favor of a flexible approach. U.S. jurisprudence has imposed the most rigid formula, requiring proof of the persecutor's intent in order to establish nexus.[226] Other States have adopted a 'but for' test derived from torts law, while others have stressed the importance of a flexible approach, suggesting that the context and nature of the claim should inform the interpretation applied in any given case. For example, the High Court of Australia has observed:

> The meaning of any statutory notion of causation depends upon the precise context in which the issue is presented. Providing that meaning will usually involve the decisionmaker in introducing considerations of policy which cannot be reduced to a strictly logical deduction from words. Thus in the field of torts law, the matter cannot be expressed as a simple formula. The 'but for' test, which was formerly much favoured by the common law, needs to be tempered by 'the infusion of policy considerations'. In the context of the expression 'for reasons of' in the Convention, *it is neither practicable nor desirable to attempt to formulate 'rules' or 'principles' which can be substituted for the Convention language.*[227]

In a trio of recent cases involving not religion, but gender asylum claims, the U.K.,[228] New Zealand[229] and Australia[230] ruled that it was not

[225] For a detailed discussion of the various tests, see Michelle Foster, 'Causation in Context: Interpreting the Nexus Clause in the Refugee Convention', (2002) 23 *Mich. J. Int'l L.* 265.

[226] *I.N.S. v. Elias-Zacarias*, 502 U.S. 478 (1992).

[227] *Chen Shi Hai (an infant) by his next friend Chen Ren Bing. v. Minister for Immigration and Multicultural Affairs* [2000] HCA 19 at para. 68, available at ⟨*http://www.austlii.edu.au*⟩ (emphasis added).

[228] *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)* [1999] (2 AC 629), available at ⟨http.www.parliament.the-stationery-office.co.uk⟩ (finding that the appellants had established causation 'irrespective whether a "but for" test, or an effective cause test, is adopted. In these circumstances the legal issue regarding the test of causation ... need not be decided')[Lord Steyn].

[229] *Refugee Appeal No.* 71427/99 (2000) at para. 115, available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (visited 26 July 2002) ('We do not in this decision have to decide what, in the refugee law context, is the appropriate causation test, an issue also left open by Lord Steyn in *Shah* ... [above n. 202] In that case Lord Hoffmann at 654E (with whom Lord Hope at 655H agreed) rejected as an oversimplification the proposition that the requirement of causation could be satisfied by applying the "but for" test'.)

[230] *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14 at para. 84, available at ⟨*http://www.austlii.edu.au*⟩ (not identifying a particular test for causation, but simply stating that 'malign intention' on the part of the persecutors is not required, but that 'it must be possible to say in a given case that the reason for the persecution is to be found in the singling out of one or more of the five attributes expressed in the Convention definition[.]')

even necessary to fully identify the particular causation test in order to adjudicate the cases at issue. What is perhaps an even more significant aspect of these decisions is their adoption of a more contextualized approach to nexus determination. These three cases involved non-state agents of persecution, and each of the tribunals held that where the non-state actor does not persecute for a Convention reason, nexus may still be established if the State's failure to protect is linked to a Convention ground. In explaining the logic of this 'bifurcated' approach, the House of Lords invoked religious persecution during the Holocaust:

> [S]uppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity.[231]

UNHCR has expressly adopted this bifurcated approach in its recently released guidelines on social group[232] and gender claims.[233] This approach is important for religion-based claims, which frequently involve non-state agents of persecution.

3.4.3 State Jurisprudence on Causation in Religion-based Claims

Claims based on religion or belief encompass a broad range of factual scenarios, raising distinct and different issues of causation. This section groups the cases into categories representative of commonly occurring claims and provides an overview of significant interpretive issues related to nexus.

3.4.3.1 Conscientious Objection to Military Service

A number of religions have abstention from military service as a central tenet, and numerous religion-based claims for protection arise from a refusal to serve in the military. Claims based on refusal to serve are closely related to issues of prosecution/persecution. Prosecution and punishment

[231] *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)*, above n. 202.

[232] See UNHCR, Guidelines on International Protection: Membership in a Particular Social Group: UN doc. HCR/GIP/02/01, 7 May 2002, para. 19.

[233] UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees: UN doc. HCR/GIP/02/01, 7 May 2002 [hereinafter UNHCR 2002 Gender Guidelines].

pursuant to a law of general application is generally not considered to constitute persecution.[234] However, there are exceptions, including situations where the law has a discriminatory intent or effect, where it improperly interferes with the exercise of protected rights, or where the punishment for its violation is not proportional to the societal objective of the law.[235]

Consistent with these principles is the rule that sovereign nations have the right to conscript their citizenry to raise an army, and generally the prosecution and punishment of draft evaders and resisters does not constitute persecution. There are, however, exceptions recommended in the UNHCR *Handbook* when: 1) the punishment for desertion or draft evasion is disproportionate for a Convention reason;[236] or 2) the refusal to serve is based on genuine political, religious, or moral convictions, or valid reasons of conscience.[237] A refusal to serve for political convictions must meet the additional criteria of demonstrating that the type of military action to which the individual objects 'is condemned by the international community as contrary to basic rules of human conduct . . . '.[238] The rationale underlying the general rule that prosecution and punishment of conscientious objectors can constitute persecution is that to punish an individual for adhering to religion or belief is tantamount to persecuting him for these beliefs.

United States

Owing to the nexus 'proof of intent' requirement in the U.S., claims for refugee status based on conscientious objection — especially religiously-motivated conscientious objection — have not fared well. Courts have consistently ruled that the government's intent was to raise an army, not to persecute the applicant for his or her religion or belief, and that therefore nexus could not be established. The landmark case on this issue is *Cañas-Segovia v. INS*,[239] ruling that it is not religious

[234] The UNHCR *Handbook*, para. 56–60, addresses exceptions to the rule that prosecution is not persecution. UNHCR, *Handbook*, n. 22 above, para. 56–60.

[235] See, for example, Goodwin-Gill, n.3 above, 52–3 (footnote omitted):

> Every government has the right to enact, implement and enforce its own legislation, inherent in its sovereignty and in the principle of the reserved domain of domestic jurisdiction. Notwithstanding the presumption of legitimacy in the legislative field, the discriminatory application of law or the use of law to promote discrimination may tend to persecution. In this sense, a human rights perspective can inform the approach to persecution, for example, by indicating which rights are absolute, which may be 'subject to such restrictions as are prescribed by law and reasonably necessary in a democratic society', whether restrictions are reasonably necessary, and whether any prohibition or penalty is proportional to the (social) objective that the legislation aims to achieve.

[236] UNHCR, *Handbook*, n. 22 above, para. 169.

[237] Ibid., para. 170.

[238] Ibid, para. 171.

[239] *INS v. Cañas-Segovia*, 970 F.2d 599 (9th Cir. 1992)

persecution to punish Jehovah's Witnesses[240] for refusing to perform military service.[241]

Canada

In contrast to the U.S., Canada interprets 'for reasons of' in a manner which recognizes conscientious objectors as refugees. It does this by adopting a nexus analysis which looks to either the intent *or the effects* of the law requiring military service. The principal case setting forth this approach is *Zolfagharkhani v. Canada*[242] involving an Iranian who did not want to serve in the military of his country after he learned that the government intended to use chemical warfare against the Kurds.[243] The Court ruled that 'the ... definition of Convention refugee makes the intent *(or any principal effect)* of an ordinary law of general application ... relevant to the existence of persecution'.[244] Canadian tribunals have consistently applied an interpretation contemplating protection in cases involving objections to military service based on religion or belief.[245]

[240] The official position of the Jehovah's Witnesses regarding military service is as follows:

Jehovah's Witnesses are conscientiously opposed to war and to their participation in such in any form whatsoever. For this reason they inform officials of the government that they conscientiously object to serving in the military, in any substitute service therefor or in any civilian capacity which fosters or supports the military....

The National Interreligious Service Board for Conscientious Objectors, *Words of Conscience, Religious Statements on Conscientious Objection* 115 (10th Ed. 1983), quoted in Karen Musalo, 'Swords into Ploughshares: Why The United States Should Provide Refuge to Young Men who Refuse to Bear Arms for Reasons of Conscience', (1989) 26 *San Diego L. Rev.* 849, 866 n. 88.

[241] This ruling was contrary to the position urged by the UNHCR in a brief *amicus curiae* in *Cañas*. Goodwin-Gill, Timberlake & Steinhardt, n. 24 above. There are two Ninth Circuit decisions; *Cañas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990) (*Cañas* I) and *Cañas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992) (*Cañas* II). In *Cañas* I, decided before the U.S. Supreme Court imposed an intent requirement, the Ninth Circuit found that to punish a conscientious objector for adherence to his religious beliefs had the effect of persecuting him for his religion, and therefore is persecution 'on account of religion'. After the Supreme Court adopted an intent requirement, it vacated *Cañas* I, and remanded it to the Ninth Circuit. (112 S.Ct. 1152) In light of the intent requirement, the Ninth Circuit Court of Appeals ruled that it could no longer find persecution on account of religion. On the facts of the case, however, the court granted on the alternative theory of imputed political opinion because the evidence established that young Salvadoran men who refused to serve in the military were suspected of being affiliated with the anti-government guerrillas, and were targeted for disappearance and extrajudicial execution.

For an extended discussion of the two *Cañas* decisions and the distinctions between an intent and effects test in U.S. First Amendment, as well as U.S. asylum law, see Karen Musalo, 'Irreconcilable Differences', n. 25 above, at 1213–40.

[242] *Zolfagharkhani v. Canada (Minister of Employment and Immigration)* (C.A.) [1993] 3 F.C. 540, also available at (*http://www.canlii.org*).

[243] Ibid. at 1–2.

[244] Ibid. at 8.

[245] See, for example, *Rostamzadeh-Jahan v. Canada (Minister of Employment and Immigration)* [1993] 38 A.C.W.S. (3d) 571, also available at 1993 A.C.W.S.J. LEXIS 44101 (setting aside decision of Immigration and Refugee Board denying relief where Iranian testified he left the military before fulfilling his service because the Koran and Mohammed directs one not to kill one's Muslim brothers); *Ciric v. Canada (Minister of Employment and Immigration)* [1993] 71 F.T.R. 300 (setting aside

New Zealand

In New Zealand, the RSAA's approach is similar to that of the U.S. It has generally cited the fact that military service is imposed by way of a law of universal application, and therefore neither the service itself nor punishment for refusal is linked to a Convention reason.[246] There appears to be one case which is an exception to this general trend, involving a Baptist from the Ukraine who refused military service as contrary to his religious beliefs.[247] The RSAA has limited this positive ruling to its facts, and distinguished it from successive cases that have come before it.[248] It has denied claims of a Russian citizen with religious and moral objections to serving in Chechnya;[249] a national of Ukraine and the Russian Federation with religious objections to serving in Chechyna;[250] and two separate cases of Jehovah's Witnesses from South Korea.[251]

United Kingdom

In a recent decision, *Sepet and Bulbul*,[252] the House of Lords denied the claims of two Kurds who objected to military service in Turkey. The two men were not opposed to all military service, but did not want to fight in Turkey's military because they believed they would be compelled to fight against fellow Kurds and engage in acts contrary to international norms — an allegation which the Lords rejected.[253] Unlike the tribunals of the United States, which focus on the issue of intent or motivation, the

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decision of Board where Serbs did not want to serve in ongoing military action in Yugoslavia in the early 1990s).

[246] The RSAA does recognize that a viable claim may be based on *Handbook* paragraphs 169 (disproportionate punishment) or 171 (military action in contravention of human rights norms).

[247] *Refugee Appeal No.* 1789/93 (1995) cited in *Refugee Appeal No.* 71219/99 (1999) at 14, available at ⟨*http://www.refugee.org.nz*⟩.

[248] The Ukrainian Baptist decision included language that 'the law relating to that alternative service appears to be being selectively and restrictively applied, and it is not at all clear that the appellant would be eligible for such service'. *Refugee Appeal No.* 1789/93 at 5–6. The RSAA relied upon this line in the decision to conclude that the recognition of refugee status was due to disproportionate or discriminatory enforcement of the universal conscription law and that the case was not a basis for a broad recognition of claims based on conscientious objection. See *Refugee Appeal No.* 71219/99 (1999) at 14, available at ⟨*http://www.refugee.org.nz*⟩.

[249] *Refugee Appeal No.* 2155/94 (1997) cited in *Refugee Appeal No.* 71219/99 (1999) at 8, available at ⟨*http://www.refugee.org.nz*⟩.

[250] *Refugee Appeal No.* 70625/97 (1998) cited in *Refugee Appeal No.* 71219/99 (1999) at 10, available at ⟨*http://www.refugee.org.nz*⟩.

[251] *Refugee Appeal No.* 71219/99 (1999); *Refugee Appeal No.* 71055/98 (1998) cited in *Refugee Appeal No.* 71219/99 (1999) at 10, available at ⟨*http://www.refugee.org.nz*⟩.

[252] *Sepet (F.C.) and Another (F.C.) v. Secretary of State for the Home Department* [2003] 3 ALL ER 304 (House of Lords), available at House of Lords decisions delivered since 14 Nov. 1996 *http://www.publications.parliatment.uk/pa/ld199697/ljudgmt/ldjudgmt.htm* (visited 18 Mar. 2004).

[253] Ibid. at paras. 3, 8, 26.

Lords focused for the most part on whether there is a fundamental right to conscientious objection (Lord Hoffman) or to non-combatant military service (Lord Bingham). Although the Lords found a growing recognition of these rights in international law, they did not find they had attained the status of international rights.[254]

In focusing on the status of conscientious objection within the framework of internationally recognized human rights in determining entitlement to Convention protection, the Lords adopt a laudable approach — namely that international norms on freedom of religion and belief ought to inform the adjudication of religion-based claims. Returning to the particular norm at issue in *Sepet and Bulbul* — conscientious objection as a legitimate exercise of freedom of religion or belief — the House of Lords decision itself reflects the growing recognition of such a right.[255]

That factor, considered in conjunction with the UNHCR's long-standing position on the issue, as manifested by the *Handbook* as well as its intervention before State tribunals as *amicus curiae*, support the adoption of an analytical approach in determining nexus which does not preclude protection in conscientious objection cases. An appropriate approach would employ a flexible nexus determination which is not limited by an intent-based analysis; this position is articulated in UNHCR's brief *amicus curiae* in *Sepet and Bulbul*, and was the approach applied by the Ninth Circuit Court of Appeals in *Cañas* I.[256]

3.4.3.2 Claims Precluded by an Intents-based Analysis

As demonstrated by the analysis in conscientious objection cases in the U.S. and New Zealand, an intent-based analysis may fail to protect individuals who are severely impacted as a result of adherence to their religious beliefs. The failure of protection which results from an

[254] (Lord Bingham observed that '[w]hile, therefore, there are indications of changed thinking ... there is as yet no authority to support the applicants' contention', and '[I dismiss] with a measure of reluctance since [applicants' argument] may well reflect the international consensus of tomorrow'.) Ibid. at paras.17, 20.

[255] Guy S. Goodwin-Gill writes that '[t]he international community ... appears to be moving towards acceptance of a right of conscientious objection, particularly as a result of the standard-setting activities of United Nations and regional bodies'. Goodwin-Gill, n. 3 above, 55–56. Goodwin-Gill references the numerous United Nations and European Union measures addressing conscientious objection. Ibid., at 56, n. 94.

[256] The Ninth Circuit Court of Appeals applied U.S. constitutional norms on free exercise of religion in *Cañas* I. The First Amendment to the U.S. Constitution guarantees free exercise of religion and had long applied an 'effects' rather than an 'intents' test evaluating whether there had been impermissible interference with free exercise. In *Cañas* I the Ninth Circuit held that even though the conscription statute was neutral, its impact/effect on Jehovah's Witnesses was to persecute them for their religion because it required them to participate in military actions in contravention of their religious beliefs. 902 F.2d 717 (9th Cir. 1990).

Although the U.S. Supreme Court essentially rejected its First Amendment effects test in its decision *Employment Division v. Smith*, 494 U.S. 872 (1990), the fact remains that an effects test is much more effective at protecting religious freedom than an intents test.

intent-based analysis is not limited to conscientious objection cases. The U.K. decision, *Omoruyi v. Secretary of State*[257] is demonstrative of the failure of protection which may result in other contexts involving an individual's desire to adhere to deeply held beliefs.

The applicant in *Omoruyi* was a Christian in Nigeria who resisted the demands of the Ogboni secret cult to join them and to surrender his father's body upon the latter's death. His refusal to do both arose from his Christian beliefs.[258] As a result of his refusal, the Ogboni murdered and mutilated his brother (whom they mistook for him) and killed his three year old son. The applicant's attorney had argued that the reason he was at risk was because of 'religious differences between [himself] and the Ogboni: the cult's rites demanded that he surrender his father's body for ritual mutilation and burial; his Christian beliefs prevented him from doing so'.[259] In key language which demonstrates the limits of an intent-approach, the Court denied protection, observing that the Ogboni had no intent to harm him for his religion, but simply to punish him because he refused to comply with their demands.[260]

3.4.3.3 Gender Cases Involving Repressive Social Norms

Gender asylum cases involving repressive social norms[261] constitute another category of claims which raise issues of prosecution/persecution

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See, for example, Jason W. Rockwell, 'When Congress Answers Religion's Prayer: The Religious Liberty Protection Act of 1999' (2001) 25 *Seton Hall Legis. J.* 135, 136 noting that: '[I]n *Employment Division v Smith*, the Court held that neutral, generally applicable laws that burden religious exercise without specifically targeting religious practice do not violate the First Amendment. Congress strongly criticized that ruling as inadequate protection of religious freedom . . . ', footnotes omitted).

Congress twice enacted legislation intended to limit *Smith*, and to restore an effects test. Its first attempt, the Religious Freedom Restoration Act, was struck down by the U.S. Supreme Court as unconstitutional. Rockwell at 136–7. Its second attempt, which has a more modest reach (as indicated by its title) is the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L.No. 106–274, 114 Stat. 803 (2000).

[257] *Omoruyi v. Secretary of State for the Home Department* [2001] Imm AR 175 (CA); also available at ⟨*http://www.refugeecaselaw.org/Refugee/Default.asp*⟩.

[258] Ibid. at 1–2.

[259] Ibid. at 3.

[260] *Omoruyi* at 8. This language is virtually identical to the language in *Zacarias*, 502 U.S. 478 (1992), the key U.S. decision establishing the intent requirement. In *Zacarias* the Court held that the persecution feared by the young Guatemalan who did not want to fight with the guerrillas would not be to punish him for his political opinion, but for his refusal to comply with the demand that he fight with them. *Zacarias* at 483.

[261] Some commentators also categorize cases involving female genital mutilation (FGM) as being religion-based. However there is a substantial body of literature which refutes that the practice of FGM is rooted in religion. See, e.g., Alexi Nicole Wood, 'A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation From an International Law Perspective', 12 *Hast. Women's L.J.* 347, 356 (Summer 1002) ('Religion is one of the most commonly cited justifications for FGM. The procedure has been performed by Christians, Jews, Muslims, animists and atheists, but is most commonly performed in Muslim nations. However, there is evidence of the practice of FGM dating back as far as the fifth century B.C., thereby predating both Islam and Christianity. The practice does not exist in

as well as causation/nexus. The status of women in many societies[262] may be 'restricted and dictated by legal, social or religious mores'.[263] A broad range of penalties may be imposed for failure to comply with these norms, from flogging to stoning to death.[264]

There is an increasing trend to analyze such gender claims under the rubric of social group.[265] However, as the May 2002 UNHCR Guidelines on Gender-Related Persecution state, when the norms derive from religion,[266] such claims may also be analyzed as religion based claims.[267] A woman's resistance to conforming her behavior 'may be perceived as evidence that [she] holds unacceptable religious opinions regardless of what she actually believes'.[268] In cases where the religion is an official or State religion, the claim may also be analyzed in terms of political opinion, in that the failure to conform 'could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows'.[269]

The UNHCR Guidelines of 2002 affirm the approach already adopted by a number of State tribunals on this issue. For example, in *Namitabar v. Canada*,[270] the Federal Court of Canada ruled that because Iran is a theocracy, the failure to observe the clothing code 'could be regarded as a political act giving rise to a valid fear of persecution'.[271] The *Namitabar*

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the teachings of any formal religion'.); Christopher T. Paresi, 'Symbolic Rites: Examining the Adequacy of Federal Legislation Addressing the Problem of Female Excision in the United States', 8 *Buff. Hum. Rts L. Rev.* 163, 171 (2002) ('Dorenkenoo discusses the controversial belief that FE [female excision] is rooted in certain religions, more specifically how FE correlates to the religion of Islam. While it is argued that there is no mention of FE in the Koran, it is also disputed that the practice is deeply rooted in Sunna,or the words and actions of the Islamic Prophet Mohammed'.).

[262] Numerous reports of the Special Rapporteur describe how women are among the most affected victims of religious extremism. See, for example, A/53/279, n.5 above, para 91; A/54/386, n.5 above, para. 129(b), 134–139; E/CN.4/2000/65, n. 7 above, para. 173; E/CN.4/2001/63, n.7 above, para. 86.

[263] Heaven Crawley, *Refugees and Gender: Law and Process*, (Bristol: Jordan Publishing Limited, 2001), 113.

[264] Ibid.

[265] This social group analysis was first recommended in ExCom Conclusion No. 39, Refugee Women and International Protection (1985) para. (k):

Recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.

UNHCR, 'Refugee Women and International Protection', Executive Committee Conclusion No. 39 (XXXVI) 1985, para. (k).

[266] In her seminal article, 'Orientalism Revisited in Asylum and Refugee Claims', 12 *IJRL* 7 (2000), Susan Akram makes a persuasive argument that the repressive norms do not derive from the dictates of Islam, but are related to the issues of male domination, male power structure and religious orthodoxy.

[267] UNHCR 2002 Gender Guidelines, n. 233 above, para. 25.

[268] Ibid.

[269] UNHCR 2002 Gender Guidelines, n. 233 above, para. 26.

[270] *Namitabar v. Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 42; also available at (*http://www.westlaw.com*).

[271] Ibid. at 2.

decision directly addresses the prosecution/persecution dichotomy, rejecting the analysis that punishment under Iran's laws was merely prosecution. The Federal Court of Canada ruled that the law requiring wearing of the chador was not of general application because it applied only to women, and that the penalty (74 strokes of the whip) was disproportionate and inflicted without procedural guarantees.[272]

The New Zealand tribunals have followed a similar analysis. In *Refugee Appeal Number* 2039/93, the RSAA ruled positively on the claim of an Iranian woman who opposed 'the patriarchal society comprising her extended Arab family and ... the male domination of women in Iranian society at large ...'.[273] The RSAA ruled that her well-founded fear of persecution was on account of religion and political opinion, given the fact that Iran is a theocracy.[274] It ruled that way again in *Refugee Appeal Number* 2223/94,[275] another claim for asylum based on resistance to the Iranian government's restrictive gender-specific dress codes.

The federal courts in the United States have issued three significant decisions involving claims based on repressive social norms. However, only one of the three, *Fisher v. INS*,[276] was premised on a claim of religion, rather than social group,[277] and that decision once again underscores the limits of an intent-based analysis.

The claim of Saideh Fisher, an Iranian woman, was considered twice by the Ninth Circuit Court of Appeals. In its first decision ('*Fisher* I')[278] the court ruled that if one of the reasons for the government's enforcement of generally applicable laws regarding dress codes was to 'oppress those with minority religious views' persecution on account of religion could be proven.[279] The INS disagreed with the court's decision and asked a larger panel of the court ('en banc') to re-decide the case.[280] The en banc panel vacated *Fisher* I and ruled that forced compliance or punishment for refusal to comply with the repressive norms did not constitute persecution,[281] and any action taken by the government would not be on account of religion or political opinion because no intent had been proven to persecute for those

[272] Ibid.
[273] *Refugee Appeal No.* 2039/93 (1996) at 21, available at ⟨*http://www.refugee.org.nz*⟩.
[274] Ibid. at 21, 27.
[275] *Refugee Appeal No.* 2223/94 (1996), available at ⟨*http://www.nzrefugeeappeals.govt.nz*⟩.
[276] *Fisher* I: *Fisher v. I.N.S.* 37 F.3d 1371 (9th Cir. 1994); *Fisher* II: *Fisher v. I.N.S.* 79 F.3d 955 (9th Cir. 1996).
[277] The two social group cases are *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993), and *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994). In both cases the court accepted that forced compliance with the Iranian norms could constitute persecution if such compliance was 'abhorrent' to the individual's belief. The court ruled that because the women were willing to comply rather than be punished, the compliance was not so distasteful, i.e., 'abhorrent' to constitute persecution, and on that basis denied relief.
[278] *Fisher v. I.N.S.* 37 F.3d 1371 (9th Cir. 1994). [*Fisher* I]
[279] *Fisher* I at 1383.
[280] *Fisher v. I.N.S.* 79 F.3d 955 (9th Cir. 1996). [*Fisher* II]
[281] *Fisher* II at 962.

reasons.[282] Writing for the full court, Justice Wallace went so far as to state that: 'The mere existence of a law permitting the detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States'.[283]

3.4.3.4 Claims Related to Inter-religious Relationships

In situations where there is religious intolerance and discrimination against a disfavored group, individuals who do not accept the lines drawn by those harboring bias are often targeted. For this reason, individuals who have crossed the line to enter into inter-religious relationships and marriages are frequently at risk of persecution. Because the persecution is directed at individuals to punish them for entering into or maintaining a relationship, some adjudicators have initially analyzed such cases as having to do with 'personal' or 'private' matters outside the protection of the Refugee Convention. Where there is a prohibition in law regarding some aspect of the relationship, adjudicators have also analyzed such claims as involving prosecution not persecution. In two decisions, one each from the U.S. and Canada, the tribunals have reversed/quashed decisions finding inter-religious claims to be outside of the Convention's protection, and found the cases to come within the rubric of religion-based persecution. *Bandari v. INS*[284] involved the claim of a young man in Iran who was arrested after he was seen embracing a Muslim woman he had been secretly dating, in violation of a law against public displays of affection. Once it was discovered that he was an Armenian Christian, he was severely beaten, pressured in an attempt to coerce him to state that he had raped his girlfriend, and then brought in front of a judge who informed him that he had violated the prohibition on 'interfaith relationships'.[285] The judge told him he could convert to Islam or submit to punishment, which would be stoning to death if he were an adult, but would 'only' be 75 lashes and a year in prison because of his youth.[286] Bandari's grandfather managed to secure his release by payment of a bribe. He fled Iran after he had an additional incident when he encountered police officers who recognized him, and beat him while hurling ethnic and religious epithets.[287] On these facts, the Ninth Circuit Court of Appeals reversed the BIA's finding that Bandari had been prosecuted for violating a neutral law, rather than persecuted for his religion.[288]

[282] Ibid.
[283] Ibid.
[284] *Bandari v. I.N.S.*, 227 F.3d 1160 (9th Cir. 2000).
[285] *Bandari*, ibid. at 1163.
[286] Ibid. at 1163–64.
[287] Ibid. at 1164.
[288] Ibid. at 1169.

In *Chabira v. Canada*,[289] the applicant, an atheist Berber from Algeria, was involved with a Muslim woman, who became pregnant. His request to marry her was refused because of his background. When her family learned of the pregnancy, they physically attacked the applicant and his family, said he deserved the death penalty and posted his photo on the walls of mosques 'inviting vengeance'.[290] The Federal Court of Canada set aside the Refugee Division's finding that it was merely a private conflict; in relevant part the Court observed:

> ... [I]t is true ... that at the outset this was purely a private conflict between the families of two young lovers of different religions and political allegiances. However, it appears from the evidence that the problem took on considerably greater scope and a religious tint because of, first, certain matters in the applicant's family history, and second, the posting of the applicant's photo in the mosques, inviting vengeance, in accordance with the religious beliefs of the young woman's family ...
>
> [The Refugee Division] ... erred in concluding that the ground asserted by the claimant was not a ground recognized by the Convention .... The applicant, who was an atheist and non-observer, did not, it seems, respect the religious and moral customs of his girlfriend's family, and accordingly was subjected to the wrath of the entire community to which that family belonged. There is at the very least a religious connotation to this.[291]

3.4.3.5 Claims Arising During Civil War and Unrest

Many claims for refugee protection arise in the context of civil war or public unrest. The fact that they occur during such situations does not preclude the establishment of nexus to a Convention ground. A decision of the RSAA in New Zealand, *Refugee Appeal Number* 71271/99, provides an appropriate analysis for such cases, ruling that the origins and purposes of the conflict must be examined. In that case, the applicant was a black Christian from the south of Sudan. The RSAA found that because the Sudanese civil war 'is grounded primarily in issues of race and religion: simplistically put, between the fair Muslims from the north against the black Christians and animists of the south',[292] the applicant had established a well-founded fear of persecution for reasons of both his race and religion.

3.4.3.6 Overlapping Convention Reasons/Non-Convention Reasons

As reiterated a number of times, religious persecution is rarely just about religion. Among other things, it has to do with issues of race, nationality, ethnicity, political opinion and gender. It implicates political and

[289] *Chabira v. Canada (Minister of Employment and Immigration)* [1994] 27 Imm. L.R. (2d) 75, also available at ⟨*http://www.westlaw.com*⟩.
[290] *Chabira*, at 2, 4.
[291] Ibid., at 4.
[292] *Refugee Appeal No.* 71271/99(1999), at 15.

economic power, and may have its origins in historical precedents. In this context, it is easy to understand that claims of religion-based persecution often overlap with one or more of the other Convention reasons — or may overlap with non-Convention reasons. Where the cases discussed in this paper involved other Convention grounds, mention was made of that fact. However, within the jurisprudence of the four countries surveyed, the cases in which religion overlapped with one or more of the other Convention grounds are too numerous to include, and too distinct to make any generalizations. However, the conclusion which it is important to reach on this issue is that religion claims are rarely just about religion and that fact should not prejudice them from being recognized as religion-based cases where the facts support such a determination.

In a significant number of cases in which individuals face grave and serious persecution for reasons related to their religion, protection is precluded because of the failure to meet the controlling nexus requirements in the various States. Standards for establishing nexus which preclude the protection of genuine victims of religious persecution are not consistent with the broad humanitarian objectives of the Refugee Convention, nor consonant with the privileged position given to freedom of religion or belief as a non-derogable right.

Nexus determinations should not be formalistic and inflexible, but should take into consideration the nature and context of the particular claim. U.S. First Amendment jurisprudence (prior to the *Smith* decision), as well as recent U.S. congressional enactments, recognize that an intent test is inadequate to protect religious freedom. For these same reasons an intent test is also inadequate to protect victims of religious persecution. Nexus should look to both the intent and effect of the persecutor's actions.

In addition, in cases involving non-state actors, adjudicators should incorporate the bifurcated analysis adopted by a number of states and recommended by the UNHCR in its recent social group and gender guidelines. The bifurcated analysis would permit nexus to be established in relation to the non-state actor, as well as the State. Therefore,

- International norms on freedom of religion or belief do not consider 'intent' to be a relevant factor in determining whether the protected right has been violated.
- U.S. constitutional law principles prior to *Smith*, as well as recent congressional enactments recognize that there can be impermissible interference with free exercise of religion, even absent intent.
- An intent-based test for establishing nexus has proved to be inadequate in extending protection to claimants who risk serious violation of freedom of religion or belief.
- The requisite causal link may be established by a showing of either intent or effects, so that an individual who has: (1) a well-founded fear

of (2) suffering a sufficiently serious violation of the right to freedom or belief to constitute persecution (3) shall be presumed to have established nexus if the persecutor *intended* to harm the applicant for her religion, or absent intent, the *effect* of the persecutor's acts are to harm the applicant for her religion.

- In claims involving non-state actors, nexus can be established in relationship to the non-state actor, or the State.
- The causal link to religion may be satisfied: (1) where there is a real risk of being persecuted by a non-state actor for reasons of religion, whether or not the failure of the State to protect is related to religion; or (2) where the risk of being persecuted by a non-state actor is unrelated to religion, but the inability or unwillingness of the State to offer protection is for reasons of religion.

3.5 Credibility

Religion based claims raise unique credibility issues. Adjudicators are often suspicious that applicants may opportunistically claim to be adherents of a persecuted religious group in order to avoid removal. Although this concern is present in all religion-based cases, it is especially acute in cases in which the applicant alleges a post-departure, or *sur place*, conversion to a religion which is the target of persecution in his home country.

Adjudicators have adopted various approaches in their attempts to evaluate the truthfulness of the claim, and the sincerity of the belief. A favored approach is to test the applicant on knowledge of his or her religion. Also in favor is an attempted assessment as to whether the applicant's acts are consistent with the claimed religious belief or affiliation.

As the cases discussed in this section demonstrate, there are limitations to these approaches. First, in some circumstances, the depth of the applicant's convictions may be irrelevant. This would be the case where, irrespective of the applicant's own beliefs, the persecutor will view him as an adherent of the disfavored faith. Second, knowledge of a particular faith does not necessarily correlate to sincerity of conviction. This is especially true where the test of knowledge is being conducted cross-culturally. Finally, judging an applicant's knowledge or consistency of actions with beliefs runs the risk of being subject to error as the adjudicator may not have an adequate understanding of the religion to be able to make these type of assessments.

3.5.1 Depth of the Applicant's Convictions/Imputed Religious Belief

In the U.S. several decisions have ruled that the appropriate test is not whether the adjudicator believes the applicant to be a true believer, but

whether the persecuting agents will so perceive him. *Bastanipour v. INS*[293] involved the claim of an Iranian who alleged that he left his Muslim faith for Christianity, thus committing apostasy and risking death upon return to his country.[294] The Board raised doubts about his conversion because he had never been baptised, and while he was in prison for narcotics charges, he had requested a pork-free diet required by his Muslim faith.[295] The Seventh Circuit ruled that the Board's concerns about the sincerity of his beliefs were misplaced because '[w]hether Bastanipour believes the tenets of Christianity in his heart of hearts or, as hinted but not found by the Board, is acting opportunistically (though at great risk to himself) in the hope of staving off deportation would not, we imagine, matter to an Iranian religious judge'.[296] Once Bastanipour had identified himself as a Christian, he was at risk regardless of the depth of his beliefs.

This same rule was reiterated in *Najafi v. INS*,[297] also involving an Iranian who had converted from Islam to Christianity:

> In an asylum case involving a country which punishes the abandonment of religious belief, our task is theoretically easier. We must ask ourselves what would count as conversion in the eyes of the Iranian Religious Judge. [citing to *Bastanipour*]. Accordingly, we are not as concerned with the heart of the convert, but rather require some *bonafide* indicia of apostasy which would matter to the Iranian authorities.[298]

In New Zealand, a 1994 decision of the RSAA adopted a 'good faith' requirement to claims such as these which arise in the *sur place* context.[299] An applicant who 'cynically' engages in activities in the host country with the objective of putting himself at risk so as to create a claim for asylum may be denied. The applicant initially claimed to have been arrested in Iran for possession of The Satanic Verses. After lodging his claim in New Zealand, he there sought out television and print exposure regarding his claim of persecution.[300] He subsequently admitted that his claim was untrue, but then argued that he was at risk because the Iranian authorities knew he had applied for political asylum and that he claimed to have been in possession of The Satanic Verses.[301] After reviewing the position of scholars and the comparative jurisprudence,[302] the RSAA concluded that

[293] *Bastanipour v. I.N.S.*, 980 F.2d 1129 (7th Cir. 1992).
[294] Ibid. at 1131.
[295] Ibid. at 1132.
[296] *Bastanipour* at 1132.
[297] *Najafi v. I.N.S.*, 104 F.3d 943 (7th Cir. 1997).
[298] Ibid. at 949.
[299] *Refugee Appeal No.* 2254/94 (1994), available at ⟨*http://www.nzrefugeeappeals.govt.nz*⟩.
[300] Ibid. at 3.
[301] *Refugee Appeal No.* 2254/94, at 5.
[302] The jurisprudence reviewed included that of Germany, Switzerland, France, the U.K., the U.S. (including *Bastanipour*) Canada, and Australia.

the integrity of the system[303] required a rule which generally required good faith on the part of the applicant. The RSAA cautioned that the rule was to be 'applied with caution, not zeal' and would often involve an assessment which balanced the 'degree of bad faith, the nature of the harm feared and the degree of risk'.

3.5.2 Knowledge of Religion and Acts Consistent with Religion

Although the tribunals of all four countries attempt to evaluate the credibility of religion-based claims by assessing the applicant's knowledge of religion and consistency of actions with the religion, the tribunals acknowledge the fallibility of such approaches. In the United States, the difficulty of assessing faith was remarked upon by the court in *Najafi* where it observed that: '[d]etermination of a religious faith by a tribunal is fraught with complexity as true belief is not readily justiciable'.[305] Judicial unease with attempting to evaluate faith — especially in a cross-cultural context — was remarked upon by a Ninth Circuit judge in his dissent to an opinion finding a Nicaraguan applicant not credible in his claims to be a Jehovah's Witness.[306] One of the bases for the majority's affirmance of an adverse credibility finding was that the applicant had given his testimony under oath, an act believed to be inconsistent with Jehovah's Witness beliefs. In his dissent, Judge Ferguson criticized this finding, first noting that there did not appear to be an objective basis in the record for the belief that Jehovah's Witnesses do not give testimony under oath. Judge Ferguson referred to the IJ's 'personal belief that Jehovah's Witnesses do not swear under oath' and the IJ's 'improper ... reliance on his understanding of the religious practices of Jehovah's Witnesses'.[307] In addition, Judge Ferguson took note of the cross-cultural and language issues, observing that there may be a difference in Spanish between 'swearing' and 'affirming'[308] and it was unclear if the interpreter made that distinction clear. Finally, the Judge alluded to the pressure that an asylum seeker may be under, noting that the two times that the applicant 'swore under oath were in response to the court's direction that he take the oath'.[309]

Tribunal decisions from Canada and New Zealand acknowledge other problems related to assessing credibility on the basis of knowledge of

[303] The RSAA noted that: 'Our decision to interpret the Refugee Convention as requiring, implicitly, good faith on the part of the asylum seeker turns on a value judgement that the Refugee Convention was intended to protect only those in genuine need of surrogate international protection and that the system must be protected from those who would seek, in a *sur place* situation, to deliberately manipulate circumstances merely to achieve the advantages which recognition as a refugee confers'. *Refugee Appeal No.* 2254/94, at 37.

[305] *Najafi*, n. 297 above, 949.

[306] *Mejia-Paiz v. I.N.S.*, 111 F.3d 720 (9th Cir. 1997) [Ferguson J dissenting].

[307] Ibid. at 726.

[308] Ibid.

[309] Ibid.

religion or consistency of actions with beliefs. First, the adjudicator may be asking questions regarding religion which are totally inappropriate either in an objective sense, or in the cross-cultural context of an asylum proceeding. The New Zealand tribunal addressed these issues in a case where the officer had asked the Chinese applicant seven pages of typewritten questions regarding Christianity, including questions which 'could be answered only with extreme difficulty even by English-speaking persons versed in theology ... [with a] memory that permitted the parrot recitation of randomly chosen excerpts from either the Bible or the Psalms ...'.[310] In addition to criticizing these questions as inappropriate, a fact exacerbated by 'translation difficulties', the RSAA referred to *Bastanipour* for the point that the determinative issue is whether the Chinese authorities considered the applicant to be an adherent to his new faith.[311]

Another issue which tribunals recognize may arise when adjudicators quiz applicants about religious tenets or practice is that the adjudicators may be poorly informed themselves on these issues. The Federal Court in Canada quashed a decision of the CRDD in the case of an Iranian who alleged he converted from Islam to Zoroastrianism.[312] The CRDD had based its adverse credibility finding partially on the fact that the applicant 'did not know of the famous Zoroastrian temple in Yazd'[313] when in fact the temple in question was an Islamic mosque and not Zoroastrian.[314]

[310] *Refugee Appeal No.* 1496/93 (1995) at 3, available at ⟨*http://www.refugee.org.nz*⟩.

[311] Ibid. at 4. A case currently pending at the Eighth Circuit Court of Appeals (*Chang Hua Wang v. Ashcroft*, 02–2814) demonstrates that adjudicators continue to evaluate the risk of persecution from the adjudicator's perspective, rather than that of the persecutor. The applicant in this case was a young Chinese woman who practiced in an underground Catholic church, not authorized by the government. Her testimony that she had practiced on a weekly basis with the underground church for five years before fleeing China was unchallenged and accepted as true, as was her testimony that she attended church on a regular basis since arriving in the U.S. The immigration judge, however, found her religious claim to be weakened by the fact that she had not been baptized as a Catholic, did not know the name of the current Pope, was never 'formally registered with the Catholic Church', and had two abortions while in the United States – one of them the result of a pregnancy resulting from repeated rapes at the hands of the smugglers who transported her to the United States.

Regarding the abortions, the immigration judge stated:

> The Court is concerned by the fact that the applicant has had two abortions while in the United States. The Court does not dispute the applicant's right under the American legal system to obtain an abortion. However, it is a well-established fact that one of the primary doctrines of the Catholic Church, and probably the most publicly known doctrine of the Catholic Church, is strong opposition to abortion. The Court feels that the fact that the applicant has had two abortions in this country [sic] that detracts from the strength of her claims for religious convictions under Catholicism.
> Decision of the Immigration Judge, File #A72 898 126, at 16.

All of the factors cited by the judge are relevant to whether he thought the applicant was a good Catholic, rather than whether the Chinese government would perceive her as being a Catholic practicing in a prohibited manner.

[312] *Razm v. Canada (Minister of Citizenship and Immigration)* [1999] Docket: IMM-3796–98, available at ⟨*http://decisions.fct-cf.gc.ca*⟩.

[313] Ibid., at 2.

[314] A documentary on the U.S. asylum system captures a similar incident on film in which an asylum officer explains that he denied the claim of an Anglican from Romania because in response to

In other cases, the tribunals take note of the fact that lack of knowledge may be an inappropriate basis for denial where religion overlaps with nationality, and the applicant has presented unchallenged proof of nationality. This factual scenario arose in *Markovskaia v. Canada*,[315] where the Federal Court of Canada quashed a CRDD decision in the case of a Jewish applicant from the Ukraine. The CRDD had been troubled by the applicant's 'vague and general' knowledge of her religion, and had seemingly ignored the fact that documents whose authenticity had not been questioned (the applicant's birth certificate indicating the nationality of both of her parents as Jewish, and her internal passport identifying her as Jewish) established that she was in fact Jewish.[316]

Notwithstanding recognition of the limitations inherent in the 'knowledge/consistency' approach to credibility, tribunals do continue to uphold adverse credibility findings on this basis. Sometimes the applicants have a fairly extensive lack of knowledge,[317] while in other cases the denial is on the basis of an inability to answer what appear to be more specific and demanding questions. In this latter category would be the case of an applicant from Pakistan who alleged problems arising from his membership in the Shi'a sect of Islam.[318] The federal court upheld an adverse determination based on the applicant's inability to name Shi'a's twelve imams, to demonstrate the washing ritual performed prior to regular prayers, or to correctly answer a question regarding the sequence of evening and night prayers among the Shi'a.[319] The applicant's attorney protested that the level of knowledge expected of Mr Hussain about his faith was beyond what ordinary religious practitioners in the U.S. possess regarding their own faiths.[320]

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his question as to who is the head of the Anglican Church, she had responded the Bishop of Gibraltar. He states: 'How many Anglicans do you know who don't know that the Archbishop of Canterbury is the head of the Anglican Church?' The asylum officer turned out to be wrong, and the asylum seeker right — she was subsequently granted asylum by an immigration judge. See 'Well-Founded Fear', Directors/Producers Shari Robertson and Michael Camerini (US 2000).

[315] *Markovskaia v. Canada (Minister of Citizenship and Immigration)* [1994] 51 A.C.W.S. (3d) 519, also available at 1994 A.C.W.S.J. LEXIS 75205.

[316] Ibid. at para. 7.

[317] See, for example, *Tian Hua Li v. Canada (Minister of Citizenship and Immigration)* [2001] FCT 1245 at para. 9, also available at ⟨*http://www.decisions.fct-cf.gc.ca*⟩ (sixteen year old Chinese boy claiming to be Protestant Christian who could only talk of faith in general terms, did not know what confirmation meant, what Sunday service was, where his pastor preached, or what denomination he belonged to).

[318] *Atif Hussain v. Canada (Minister of Citizensip and Immigration)* [2000] Docket: IMM-1940–99, available at ⟨*http://decisions.fct-cf.gc.ca*⟩.

[319] Ibid. at para. 14.

[320] His counsel addressed the panel as follows:

> The subtleties of the faith, even fundamentals can be unknown to practitioners of the faith. I mean, my own personal knowledge being raised in a very devout Catholic family and the Catholic school I still couldn't name you the Ten Commandments in order. The only cardinal sin I could be sure of naming is the Cardinal of Manila . . . .

Atif Hussain at para. 24.

3.5.3 Sur Place *Claims*

Individuals who claim to be refugees *sur place* as a result of conversion in the host country to a religion persecuted in their home country are often suspected of opportunism, and the genuineness of their conversion becomes a key issue in the determination process.

Decisions from New Zealand and the U.K. demonstrate somewhat different approaches to addressing the issue of *sur place* conversion. The New Zealand decisions — all involving Iranians — appear to include an in-depth review of the individual facts in an effort to judge the credibility of the conversion, as well as a predisposition to accord the asylum seeker the benefit of the doubt. The U.K. decisions are shorter, and therefore less susceptible of analysis, but to the degree that analysis is possible, the U.K. tribunals seem less willing to extend the benefit of the doubt, and more inclined to conclude that the conversion was opportunistic.

In *Refugee Appeal Number* 70720/97,[321] the New Zealand tribunal considered the claim of an Iranian woman and her husband who first raised the issue of conversion to Christianity in a second application for asylum, after their first claim, based on political opinion, had been denied.[322] Although the timing of the claim could have heightened concerns regarding fabrication of the claim, the tribunal reviewed the couple's relationship to Islam in Iran (not devout), their experience of Christianity in New Zealand (positive with extensive assistance and support from Christians), and the wife's mental state (anxious and depressed, and soothed by the support of her newfound spirituality) to conclude that the claim was genuine.[323]

The RSAA carried out a similar review in *Refugee Appeal Number* 71066/98,[324] also involving Iranian converts to Christianity, who asserted the conversion in a second application after the first was denied.[325] The tribunal considered that the wife was drawn to Christianity because she 'perceive[d it] as being predicated on a more equitable belief system' regarding gender issues, that she had converted slowly, having contact with three different Christian denominations before deciding, and that she had corroborative evidence regarding her involvement in the church.[326]

In *Refugee Appeal Number* 71551/99,[327] the female appellant's *sur place* conversion was found credible in light of her disaffection from Islam while living in Iran, friendship and support from Christians she met in

[321] *Refugee Appeal No.* 70720/97 (1998), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (visited 26 July 2002).
[322] Ibid. at 2.
[323] Ibid. at 8, 10.
[324] *Refugee Appeal No.* 71066/98 (1999), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (visited 26 July 2002).
[325] Ibid.
[326] Ibid. at 6.
[327] *Refugee Appeal No.* 71551/99 (1999), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩ (visited 25 July 2002).

New Zealand, and the fact that her participation in the church and her commitment to it was corroborated by a church member.[328] In *Refugee Appeal Number* 71227/99,[329] the tribunal gave the benefit of the doubt, and found credible the male applicant's conversion to Catholicism where he had been persecuted and forced to flee Iran for dating a Catholic woman, and his interest and commitment to his faith was corroborated by members of the church.[330]

As noted earlier, the three U.K. decisions involving *sur place* claims are short of facts, but the cases recite the following reasons for disbelief of conversion: the Pakistani convert to Ahmadi faith could not satisfactorily explain his beliefs;[331] the Pakistani convert to Ahmadi faith had not mentioned the conversion at his initial interview, and the adjudicator believed his corroborative evidence had been forged;[332] the applicant, whose husband was Ahmadi, did not convert until she arrived in the U.K.[333]

3.5.4 Other Credibility Issues in Religion Cases

Although they are not specific or unique to religion cases, the decisions in credibility address other issues which often come up in adjudicating the truthfulness of the claim. There are several cases which hold that failure to mention religious persecution at the onset does not defeat the claim.[334] A substantial number of cases follow the UNHCR *Handbook* paragraph 199 guidance that '[u]ntrue statements by themselves are not a reason for refusal of refugee status[.]'.[335] These cases cover situations involving outright lies, 'embellishments' and forged evidence. Yet where the core of the claim was credible, the fact that the applicant had lied or exaggerated in an attempt to strengthen the claim, did not defeat it.[336]

[328] Ibid. at 6.

[329] *Refugee Appeal No.* 71227/99 (1999), available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩.

[330] *Refugee Appeal No.* 71227/99 at 8.

[331] *Queen, Ex Parte Butt v. Secretary of State of the Home Department* [1998] EWCA Civ 1858, also available at ⟨*http://www.bailii.org*⟩.

[332] *Hussain v. Secretary of State for the Home Department* [1998] (CA), available at ⟨*http://www.lexis.com*⟩.

[333] *Yasmin v. Secretary of State for the Home Department*, [1999] EWCA Civ 1633, also available at ⟨*http://www.bailii.org*⟩.

[334] See, for example, *Refugee Appeal No.* 300/92, n. 137 above, at para. 5 (Iranian who converted to Hare Krishna found credible even though he only referred 'obliquely' to the religious aspect of his claim during his Refugee Status Section interview; tribunal noted that he was fearful the information could come to the notice of the Iranian authorities); *Refugee Appeal No.* 265/92 (1994) at 5, available at ⟨*http://www.refugee.org.nz/csearch.htm*⟩ (visited 19 June 2002) (reversing adverse credibility finding in case of Iranian applicant, where one of three reasons for not finding him credible was his failure to disclose basis of claim upon arrival at Auckland airport).

[335] UNHCR, *Handbook*, n. 22 above, para. 199.

[336] See, for example, *Chen v. Canada (Minister of Citizenship and Immigration)* [2002] 2002 FCT 480, also available at ⟨*http://www.decisions.fct-cf.gc.ca*⟩ (in claim by Falun Gong adherent from China, lies about one aspect of claim may not preclude having a well-founded fear); *Refugee Appeal No.* 2223/94 (1996) at 12 (Iranian woman who lied about facts of departure from her country found to be credible about core facts of claim); *Refugee Appeal No.* 70222/96 (1997) at 18 (Pakistani man with long history of

In sum, factfinders utilize various approaches in attempting to evaluate the truthfulness of religion-based claims, including testing knowledge of religion and judging consistency of actions with asserted beliefs. Suspicions regarding the sincerity of claims are often heightened in post-departure conversions. The approaches to judging credibility must be sensitive to the nature of religious belief, religious persecution (including persecution for imputed religious affiliation or belief) and cross-cultural issues. With that in mind, the following conclusions might be drawn:

- Detailed knowledge of the applicant's religion does not necessarily correlate to sincerity of belief.
- In questioning an applicant about his/her religion, the factfinder is to be aware of the educational, cultural, psychological and other factors which may have an affect on the applicant's knowledge of his or her religion.
- The factfinder should take into consideration limitations on religious practice in the country of origin, and how they may impact the applicant's knowledge of his or her faith.
- Detailed knowledge of the applicant's religion does not necessarily correlate to the risk of persecution.
- Notwithstanding a lack of detailed knowledge, persecutors in the home country may consider the applicant to be an adherent of the disfavored or persecuted religion, and persecute them as such (that is, for imputed beliefs).
- In situations where aspects of the applicant's beliefs or actions are being evaluated, the factfinder should make all attempts necessary to confirm that his own knowledge of the religion — upon which he is judging the applicant — is correct.
- It is encouraged that experts be consulted to provide reliable information regarding the religion at issue.
- The fact that a conversion is post-departure should not give rise to a presumption that the claim is fabricated. The factfinder should make an inquiry into the applicant's past and present circumstances in order to properly evaluate whether the conversion is genuine.

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abuse by family and clerics, who had psychiatric problems, and who was found to have embellished, exaggerated, given false information, and a forged document was found credible as to central facts of claim); *Refugee Appeal No.* 70692/97 (1998) at 16 (RSAA had doubts about departure-related facts in claim of ethnic Korean in China who developed relationships with Christian missionaries, but found remainder of his claim credible and gave him the benefit of the doubt); *Refugee Appeal No.* 70903/98 (1998) at 11 (some aspects of claim of citizen of Ukraine appeared questionable, but fact that he had been beaten by militia because he is Jewish was corroborated and believable); *Refugee Appeal No.* 70851/98 (1998) at 4 (core of claim found credible in case of Catholic from Bangladesh who admitted he had lied about one aspect of story, and submitted a false police arrest document) [available at ⟨*http://www.nzrefugeeappeals.govt.nz/default.asp*⟩]; *Secretary of State for Home Department v. Drrias* [1997] EWCA Civ 1181 at 3, available at ⟨*http://www.ein.org.uk/index.html*⟩ (upholding grant of asylum to Copt from the Sudan who had submitted a forged document, where 'centrepiece' of his story was found credible).

4. Conclusion

- It is the premise of this article that the drafters of the Refugee Convention intended international norms relating to freedom of religion or belief to inform the determination of claims based on religion.
- A survey of the jurisprudence of the United States, Canada, New Zealand and the United Kingdom illustrates that this is not always the case, and that there are identifiable problems in a number of key areas.
- First, serious harms in the form of (1) physical assaults, (2) discriminatory measures of a substantially prejudicial nature, (3) limitations on religion, and (4) forced compliance with religious norms are often not recognized as persecution, even though they merit such recognition when analyzed within the framework of international human rights norms. This can be remedied by greater incorporation of international guidance into the evaluation of whether a harm constitutes persecution. Second, beliefs or practices which meet the international criteria for recognition as a 'religion' are often rejected as such. Greater attention to relevant international authority, such as the UDHR, the ICCPR, relevant General Comments ussed by the U.N. Human Rights Committee, and other like bodies, is called for to improve decision-making in this area. Third, overly formalistic nexus determinations frequently result in a failure of protection from persecution on religious grounds. The adoption of a flexible nexus analysis, which is neither exclusively intent-based nor effects-based, and which incorporates the UNHCR's bifurcated analysis, would greatly remedy this problem. Fourth, adjudicator suspicion of religion-based claims — especially in cases of *sur place* conversion — has lead to the imposition of what is often an inappropriate approach to credibility determination. The recognition that a detailed knowledge of the applicant's religion does not necessarily correlate to sincerity of belief or to the risk of persecution would improve the credibility determination process.